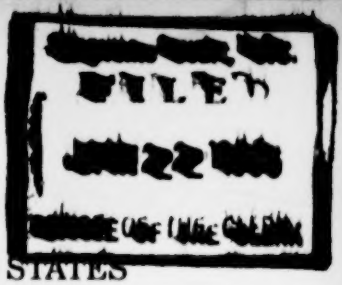
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NO. _____



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS,
Appellants,

KIRK FORDICE, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI, members of the State Board of Election Commissioners
Appellees,

and THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE, TIM FORD, in his official capacity as Speaker of the House of Representatives, and WALTER A. GRAHAM, in his official capacity as President Pro Tempore of the Mississippi Senate
Appellees-Intervenors.

On Appeal From An Order of The Three-Judge Court
Of The United States District Court For The
Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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THE QUESTIONS PRESENTED FOR REVIEW

1. When the merits of a voting rights case pending before a three-judge district court are resolved, and the prevailing party thereafter files a motion for an award of attorney fees and litigation expenses before the managing district judge only, does the three-judge district court then have jurisdiction or the authority to decide the attorney fees motion?

2. When essential facts are disputed on a motion for an award of attorney fees and litigation expenses, is an evidentiary hearing, complete with cross-examination, required before a district court can determine a proper attorney fees award?

3. Did the three-judge district court abuse its discretion in awarding an unreasonably low attorney's fee when the results obtained by the prevailing parties were exceptional?

4. Were appellants entitled to interest on the amount of attorney fees and litigation expenses awarded?

LIST OF PARTIES

The parties to the proceeding below were the appellants, Hollis Watkins, Alice Harden, Aaron Henry, Edward Blackmon, Jr., Samuel McCray, Jacqueline Harper, Ben F. Burkett, Mac Arthur Cotton, and John Quincy Adams, on behalf of themselves and all others similarly situated; and the appellees, Kirk Fordice, Governor of the State of Mississippi, Mike Moore, Attorney General of the State of Mississippi, and Dick Molpus, Secretary of State of the State of Mississippi, members of the State Board of Election Commissioners, and appellee -intervenors, the Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature, Tim Ford, in his official capacity as Speaker of the House of Representative; and Walter A. Graham, in his official capacity as President Pro Tempore of the Mississippi Senate.

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REFERENCE TO OFFICIAL OPINION BY LOWER COURT

Appellants seek review, on direct appeal and by writ of certiorari prior to judgment to the United States Court of Appeals for the Fifth Circuit, of a memorandum opinion and order entered by a three-judge district court for the Southern District of Mississippi on October 29, 1992 denying appellants motion to dissolve the three-judge court and to remand their attorneys fees and litigation expenses motion to the managing judge for decision, denying appellants an evidentiary hearing, and denying appellants the fully compensatory fee to which they were entitled. The order of the three-judge district court that is being appealed has not yet been reported and is set out in full in the Appendix, at pages App. 2a-26a. This ancillary attorney fees order was issued after the case on the merits had been resolved. The decisions of the three-judge district court resolving the case on the merits are reported as **Watkins v. Mabus**, 771 F. Supp. 789 (S. D. Miss.) (three-judge court), **aff'd mem. in part and vacated in part as moot,** ___ U.S. ___ , 112 S. Ct. 412, 116 L. Ed. 2d 433 (1991), and **Watkins v. Fordice**, 791 F. Supp. 646 (S.D. Miss. 1992) (three-judge court).

STATEMENT OF THE GROUND FOR INVOKING JURISDICTION

This is a direct appeal from an order issued by a three-judge district court on October 29, 1992 denying appellants' motion to dissolve the three-judge court and to remand the case to the managing district judge for a determination of a reasonable attorneys' fee, and denying appellants an evidentiary hearing and attorney fees in the amount requested. The attorney fees order appealed herein was entered by the three-judge district court ancillary to resolution of the case on the merits. The three-judge district court was convened pursuant to 28 U.S.C. Section 2284 and 42 U.S.C. Section 1973c to

decide the constitutionality of the Mississippi legislative reapportionment plans and to decide issues raised under Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Sections 1973 and 1973c. Those issues were resolved on August 9, 1991 and May 21, 1992.

Appellants filed a timely notice of appeal in the Untied States District Court for the Southern District of Mississippi on November 25, 1992 simultaneously appealing the attorney fees order to the Untied States Supreme Court and to the United States Court of Appeal for the Fifth Circuit. The notice of appeal is set out in full in the Appendix, at pages 69a-71a.

Jurisdiction was invoked in the district court pursuant to **28 U.S.C. Sections 1331, 1343,** and **2284** and **42 U.S.C. Section 1973c**. The jurisdiction of this Court is invoked, on direct appeal, pursuant to **28 U.S.C. Sections 1253** and **2284** and **42 U.S.C. Section 1973c.**

If, however, this Court determines that it does not have jurisdiction over appellants' direct appeal because it is not from an order granting or denying an injunction, see **Mitchell v. Donovan**, 398 U.S.C. 427, 430 (1970), then "it is appropriate" that this court treat appellants' "jurisdictional statement as a petition for writ of certiorari prior to judgment in the Court of Appeals." **Turner v. Memphis**, 369 U.S. 350, 353-54 (1962). **28 U.S.C. Sections 1254 (1) and 2101 (e).** Appellants perfected an appeal to the United States Court of Appeals for the Fifth Circuit. No issues on the merits remain to be resolved. If this Court determines that it does not have jurisdiction of appellants' direct appeal, then appellants respectfully request that this Court treat this jurisdictional statement as a writ of certiorari prior to judgment to the United States Court of Appeals for the Fifth Circuit. "It is a familiar practice of this Court that where for any reason the Court may not properly proceed with a case brought to it on appeal, or when for any reason it is without power to proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires." **Walling v. James V. Reuter, Inc.**, 321 U.S. 671, 676 (1944). See also, **28 U.S.C. Section 2106.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Civil Rights Attorney Fees Awards Act of 1976 and the Voting Rights Act attorney fees provisions, **42 U.S.C. Sections 1988** and **1973l (e).** The texts of the statutory provisions are set out in the Appendix, at pages 73a-74a.

STATEMENT OF THE CASE

Appellants filed the instant vote dilution action in June, 1991 asserting claims under the 14th and 15th Amendments to the United States Constitution and Sections 2 and 5 of the Voting Rights Act of 1965. App. 44a-48a. They sought declaratory and injunctive relief prohibiting use of the 1991 unprecleared legislative apportionment schemes and the 1982 malapportioned and racially discriminatory apportionment schemes for legislative elections scheduled for the Fall of 1991. And, appellants sought implementation of precleared court ordered or court approved apportionment plans for the Mississippi Legislature that did not discriminate against black voters. App. 44a-48a . Throughout the course of the litigation appellants sought the creation of the maximum number of electable black majority legislative districts (compact black majority districts wherever possible). App. 18a, 62a-63a. This results was achieved. App. 18a, 50a-51a.

Appellants were represented by seven (7) attorneys throughout the course of the litigation while the appellees and appellee-intervenors were represented by 13 attorneys. App. 8a, 51a-52a. Prior to filing the case, appellants' counsel spent a considerable amount of time "legitimately and reasonably related to the advancement of the litigation as, for example, time spent gathering information, defining plaintiffs' criteria and drafting proposed apportionment plans." App. 10a. In all, appellants' counsel spent 605 hours working on the case prior to filing the lawsuit and 1,967.55 hours after filing the action. After extensive litigation and negotiations, the parties settled the action essentially granting

appellants all the relief they requested. App. 18a, 44a-51a. The district court entered an order on May 21, 1992, **Watkins v. Fordice**, 791 F. Supp. 646, scheduling elections for the Summer and Fall, 1992 utilizing the settlement plans.

Appellants, thereafter, on June 12, 1992 filed their motion to dissolve the three-judge court and to remand the case to the managing district judge and for an award of attorney fees and litigation expenses, and a motion to conduct discovery and an evidentiary hearing on the attorney fees issues. App. 28a-39a. Appellants requested fees in the amount of $805,659.10[1] for 2,728.8 hours of work related to the case and reimbursement for out-of-pocket expenses in the amount of $61,279.29.[2] App. 8a-9a. Appellants sought a premium hourly rate for work performed on the case, or, if the district court was not inclined to award a premium hourly rate, then an enhancement of the lodestar in order that appellants may be paid a fully compensatory fee. The appellees and appellee-intervenors filed a joint response wherein they disputed and contested every element of appellants' attorneys fee claim.[3] And, they denied that the

[1]This amount reflects a one hundred percent enhancement of the normal hourly rate charged by appellants' counsel and the legal market for attorneys with comparable skill and experience for non-contingency fee cases. App. 31a-34a. The district court incorrectly characterized this enhancement as a "contingency" enhancement. Appellants expressly stated that "the lodestar is enhanced 100-300% to compensate for the risk of not succeeding, the delay in payment, exceptional results, undesirability of the case, preclusion of other employment, etc." App. 32a. Appellants did not characterize the requested enhancement as a purely "contingency enhancement."

[2]Appellants recognize that expert witness fees above $40.00 per day for testifying are not recoverable. **28 U.S.C. Sections 1920 and 1821. West Virginia Univ. Hosp., Inc. v. Casey**, ___ U.S. ___, 111 S. Ct. 1138, 1145-47, 113 L. Ed. 2d 68 (1991). However, the remainder of appellants' request for reimbursement of costs is recoverable.

[3]Appellees and appellee-intervenors argued that the hours claimed by appellants were unreasonable and excessive, the hourly rates charged by appellants were excessive and outside the market range, travel time should be compensated at less than the market rate, the expenses claimed were unreasonable and non-compensable, and that the requested enhancement of the lodestar should be denied. Appellees and appellee-intervenors argued that the lodestar should be adjusted downwardly. Appellants vigorously contested the appellees and appellee-intervenors argument, App. 41a-64a, and filed documents vitiating their defenses.

attorneys' fee issue should be remanded to the managing district judge.

The district court entered its memorandum opinion and order on October 29, 1992 denying appellants' motion to remand their attorneys' fees request to the managing district judge as well as their request to engage in discovery and have an evidentiary hearing on contested attorney fee issues. The lower court awarded appellants only $198,688.23 in attorney fees and expenses. The district court did not award interest on the fees.[4]

Appellants filed a timely notice of appeal on November 25, 1992 simultaneously appealing the order of the three-judge district court to this Court as well as the United States Court of Appeals for the Fifth Circuit.

[4]Appellants, in their reply to appellees and intervenors response to the attorney fees request, specifically requested that the district court award "pre-judgment and post-judgment interest." App65a.

ARGUMENT I

When the merits of a voting rights case pending before a three-judge district court are resolved, and the prevailing party thereafter files a motion for an award of attorney fees and litigation expenses before the managing district judge only, then the three-judge district court does not have jurisdiction or the authority to decide the attorney fees motion.

A three-judge district court convened pursuant to **28 U.S.C. 2284** has limited statutory duties. The court's jurisdiction is limited to "all claims raised against [a] statute when a substantial constitutional claim" is alleged. **White v. Regester**, 412 U.S. 755, 761 (1973). See also **Public Service Commission v. Brashear Freight Lines**, 312 U.S. 621 (1941) (three-judge district court convened under related predecessor statute has limited statutory duties); **Bond v. White,** 508 F. 2d 1397, 1400 (5th Cir. 1975). Once the court has performed its statutory duties, it should remand the case to the managing district judge.[5] **Public Service Commission v. Brashear Freight Lines**, supra; **Bond v. White**, supra. The court's authority is limited to deciding the constitutional and interwoven statutory issues involved.

A three-judge district court convened, pursuant to Section 5 of the Voting Rights Act of 1965, **42 U.S.C. 1973c**, likewise, has limited jurisdiction. See **Lockhart v. United States**, 460 U. S. 125, 129, n. 3 (1983). A Section 5 court has jurisdiction only to determine (i)

[5]The merits of the instant case were resolved when the appellees obtained preclearance of the settlement apportionment plans and the district court, on May 21, 1992, scheduled elections. **Watkins v. Fordice**, 791 F. Supp. at 648. The court correctly ruled that preclearance of the 1992 apportionment plans for the House and Senate had, effectively, mooted the merits of the case. App. 3a-4a. However, the court incorrectly held that appellants had not complied with the court's request for the parties to promptly notify the court "as to those motions they desire to be considered and to withdraw the remaining motions." App. 4a. Appellants, pursuant to the district court's request, filed a motion on June 12, 1992 withdrawing their request for a preliminary injunction leaving no outstanding motions on the merits for resolution by the three-judge court.

whether a voting change is covered by Section 5, (ii) if the change is covered, whether it has been precleared, and (iii) if the change has not been precleared, "what remedy is appropriate." **Id.**

The court's jurisdiction does not extend to matters ancillary to or separate and collateral from the merits consideration. "[A] request for attorney's fees under Section 1988 raises legal issues collateral to' and 'separate from' the decision on the merits. **Budinich v. Becton Dickinson & Co.**, 486 U.S. 196, 200 (1988).

It is consistent with and compelled by congressional policy regarding three-judge district courts that attorney fee issues, ancillary to and separate from the merits of the case, be relegated to a single district judge.[6] In such an event, the attorney fees decision follows the normal appellate route, thereby allowing a more efficient use of judicial resources.

The three-judge district court's decision below declining to remand appellants' motion for an award of attorney fees and litigation expenses to the managing district judge was clear error.

ARGUMENT II

When essential facts are disputed on a motion for an award of attorney fees and litigation expenses, an evidentiary hearing, complete with cross-examination, is required before a district court can determine a proper attorney's fee award.

Appellees and appellee-intervenors contested every element of appellants' attorneys fees request. They challenged the number of hours claimed as being

[6]The exercise of jurisdiction by the three-judge court below seemingly catapults appellants' appeal into a jurisdictional black hole from which there is no escape. This Court has held that appeals do not lie in the Supreme Court from decisions of three-judge district courts where injunctive relief is not granted or denied. **Mitchell v. Donovan**, supra at 430-431. The United States Court of Appeals for the Fifth Circuit has held that it does not have jurisdiction over appeals from orders by three-judge district courts granting or denying attorney fees. **Weiser v. White**, 505 F. 2d 912, 913 (5th Cir. 1975).

unreasonable and non-compensable.[7] They alleged that the compensable hours claimed were excessive and evidenced a duplication of effort.[8] They disagreed with appellants' market rate evidence that travel time is compensable at the regular billable hourly rate and not reduced by 50%[9], and they disputed appellants evidence concerning the market billable hourly rate for contingency and non-contingency fee complex civil cases.[10] Appellees and the intervenors argued that **City of Burlington v. Dague**, ____ U.S. ____ , 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992), precluded the award of any enhancement. Appellants disagreed, arguing that they were entitled to an enhancement for exceptional

[7]Appellees challenged the number of pre-filing hours appellants' counsel spent on the case incorrectly labeling some of the pre-filing work as legislative lobbying. They alleged the time claimed was unreasonable and excessive. Appellants countered that the pre-filing work included time spent negotiating and formulating criteria which was ultimately used in the reapportionment process, and therefore, was not excessive. App. 51a-55a. The district court, without a hearing, sided with appellees. App. 9a-10a.

Appellees contested all of the travel time appellants' counsel Rhodes spent on the case arguing that the travel time claimed was time spent commuting to his office in Hazlehurst from Jackson. Rhodes' filed a supplemental declaration clearly stating that he did not list, as travel time, time spent commuting to his office from home. This debate apparently confused the district court. Thus, the court, without a hearing, disallowed virtually all of Rhodes' travel time. App. 11a.

[8]They argued that time spent by appellants' counsel in responding to appellee-intervenors' motion to intervene(78.3 hours), and in pursuing a stay and appeal in this Court from the district court's order allowing elections to be conducted in 1991 under a malapportioned plan (272.5 hours), (see **Watkins v. Fordice**, Sup. Ct. Nos. 91-434 and A-116), were excessive and a duplication of effort. Appellants countered that the time was not excessive or duplicative. App. 51a-57a. Nevertheless, the district court, without a hearing, agreed with appellees and intervenors and reduced the compensable time by fifty percent (50%). App. 12a-13a.

[9]The district court, without a hearing, sided with appellees and the intervenors on this issue. App. 13a.

[10]The district court, without a hearing, awarded an unreasonably low hourly rate to appellants' counsel. App. 14a-15a. The hourly rate awarded was less than the normal billable hourly rate charged to fee paying clients by three (3) of appellants' counsel. The lower court did not even follow the law within the Fifth Circuit when setting the hourly rate. In the Fifth Circuit, if the counsel's normal billable hourly rate falls within the market rate charged by comparable counsel for comparable work, and that is the rate requested by counsel, it should be awarded. **Associated Bldrs & Const. v. Orleans Parish School**, 919 F. 2d 374, 379 (5th Cir. 1990); **Islamic Center of Mississippi v. City of Starkville**, 876 F. 2d 465, 469 (5th Cir. 1989); **Powell v. C.I.R.**, 891 F. 2d 1167, 1173 (5th Cir. 1990).

results. App. 62a-63a. The district court, seemingly, agreed that the results achieved by appellants were exceptional. Nevertheless, the court declined to enhance the lodestar, App.18a, and denied appellants an evidentiary hearing. App. 14a-15a.

This Court, in **Blum v. Stenson**, 465 U.S. 886, 892-893, and n. 5 (1984), relying on **City of Detroit v. Grinnell Corp.**, 495 F. 2d 448, 472-473 (2nd Cir. 1974), indicated that "where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award." The Second Circuit Court of Appeals in **City of Detroit v. Grinnell Corp.** expressly held that "where there were many vigorous disputes of fact over the elements that comprised the fee award, an evidentiary hearing, complete with cross-examination, is imperative." **Id.**, at 473.

Appellants submit that an evidentiary hearing, complete with cross-examination, is required when issues involving an award of attorneys fees are vigorously disputed. After all, "resolution of disputed factual issues necessitates the hearing of testimony." **Id.** at 472. It is only through a full evidentiary hearing that a complete record could be developed. The complete record is necessary for the appellate court, if there is an appeal, to determine whether or not the district judge abused his or her discretion in awarding the amount of attorneys fees. See **Blum v. Stenson,** supra .

The court below committed reversible error by denying appellants an evidentiary hearing on the disputed facts.

ARGUMENT III

The three-judge district court abused its discretion in awarding an unreasonably low attorneys' fee when the results obtained by the prevailing parties were exceptional.

In determining an appropriate attorney's fee, "[t]he product of reasonable hours times a reasonable rate does not end the inquiry." **Hensley v. Eckerhart,** 461 U. S.

424, 434 (1983). Other factors "may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained." **Id.,** at 434. Where, as here, a prevailing party "has obtained excellent results... an enhanced award may be justified." **Id.** at 435. In determining the award, "the district court should make clear that it has considered the relationship between the amount of the fee awarded and the result obtained." **Id.** at 437. The district court, after all, should keep in mind that "[t]he results is what matters." **Id.** at 435.

The lower court mentioned, in its opinion, that it "accounted for [appellants'] success in the computation of hours for which they will receive compensative." App. 18a. However, an analysis of the court's opinion clearly shows that it did not award appellants any amount for exceptional success. To the contrary, the lower court seemingly punished appellants for their exceptional results. The court did not compensate appellants for all of the hours they expended on the case. Appellants spent 2,728.8 hours working on the case, yet the lower court only compensated them for 1,879.03 hours, 68. 86% of the total hours appellants reasonable devoted to the litigation. The court stated that "it is again worth noting that [appellants'] level of success in their efforts before the court was quite low." App. 18a, n. 22. The court seemingly gave no weight to the settlement that granted appellants far more relief than the court indicated it would have awarded. Appellants should not be punished for achieving exceptional results through negotiation rather than adjudication. After all, "[t]he results is what matters." **Hensley v. Eckerhart,** supra at 435.

Another factor which indicates the lower court did not consider the relationship between the amount of the fee awarded and the results obtained is the hourly rate awarded by the court. The court acknowledged that evidence was in the record which would have supported an hourly rate "for attorneys with over ten years' experience" of "$150 to $200" and "$100 to $150 for those with four to ten years' experience." App. 14a. Yet, the court awarded substantially lower hourly rates. App.

15a..

The Court, in drastically reducing the number of compensable hours and in awarding extremely low hourly rates, did not properly consider "the relationship between the amount of the fee awarded and the results obtained." **Id.** at 437. The case should be remanded for proper consideration by the district court.

ARGUMENT IV

Appellants were entitled to interest on the amount of attorney fees and litigation expenses awarded.

Appellants requested that the court award interest on the awarded attorney fees. The district court's decision is silent as to any interest. Clearly, interest is payable on any award of attorneys fees. See **28 U.S.C. Section 1961; Copper Liquor, Inc. v. Adolph Coors Co.,** 701 F. 2d 542 (5th Cir. 1983); **Disney v. Pritzker,** 411 F. 2d 658 (7th Cir. 1969).

CONCLUSION

Because the three-judge district court was without jurisdiction to decide the attorney fees issues in this case, this Court should note probable jurisdiction, or, in the alternative, treat appellants' jurisdictional statement as a petition for writ of certiorari prior to judgment to the United States Court of Appeals for the Fifth Circuit, grant certiorari, and enter a Per Curiam opinion vacating the judgment of the three-judge district court and exercise this court's supervisory powers and decide the questions presented in this jurisdictional statement.

Dated: January 20th, 1993.

Respectfully submitted,

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APPENDICES

APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL.
Individually and on behalf of
All Others Similarly Situated

PLAINTIFFS

VS CIVIL ACTION NO. J91-0364(L)

KIRK FORDICE, Governor of Mississippi, ET AL

THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE; TIM FORD, In His Official Capacity As Speaker of the Mississippi House of Representatives; and OLLIE MOHAMED, In His Official Capacity As President Pro Tempore of The Mississippi Senate

DEFENDANTS-INTERVENORS

(FILED OCTOBER 29, 1992)

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of plaintiffs to dissolve the three-judge court previously convened in this Voting Rights Act case at the request of plaintiffs, and to remand case to managing district judge for an award of attorneys' fees and expenses. Plaintiffs have also moved for an award of attorneys' fees and litigation expenses and by their motion, they further seek discovery and an evidentiary hearing on issues relating to the prevailing market rates for attorney services, the necessity of enhancement in civil rights cases and the market difference between contingency and non-contingency fee cases. The State defendants[1]

[1]The State defendants include Kirk Fordice, Governor of the State of Mississippi, Mike Moore, Attorney General of the State of Mississippi, and Dick Molpus, Secretary of State of the State of Mississippi in their respective official capacities and as members of the State Board of Election Commissioners.

and the Joint Committee defendants-intervenors[2] have responded in opposition to plaintiffs' motion to dissolve the three-judge court and have separately responded, opposing plaintiffs' motion for an award of attorneys' fees and expenses.

The first matter which the court must address is the question whether it is proper at this juncture to dissolve the three-judge court.[3] Plaintiffs seek the dissolution of the three-judge court and a remand of the case to the managing district judge for resolution of the pending attorneys' fees motion contending that as the statutory function of the three-judge court has been fulfilled, there remains no reason nor justification for the three-judge court's remaining convened. Defendants, on the other hand, maintain that the three-judge court should remain convened, for the reason that there remain motions pending in this cause for resolution by the three-judge court and for the further reason that it may become necessary at some time prior to the scheduled November 3, 1992 elections for the three-judge court to modify, clarify or interpret the court's May 21, 1992 opinion and order. While the court is of the opinion that the three-judge court need not remain convened during the pendency of the elections due to a concededly remote possibility that there might arise a need for a modification of the court's order, the court is nevertheless of the view that it would be inappropriate to dissolve the three-judge court until such time as there has been a final resolution or disposition of each of the motions that has been filed in this action.

By order dated May 21, 1992, the court ordered "[t]hat because the preclearance of both [House and Senate] plans moots most of the pending motions, the movants

[2] The Joint Committee defendants are the Standing Joint Legislative Committee on Reapportionment of the Mississippi Legisature; Tim Ford in his official capacity as Speaker of the Mississippi House of Representatives; and Ollie Mohamed in his official capacity as President Pro Tempore of the Mississippi Senate.

[3] The facts and procedural history of this case are fully set forth in the court's prior opinions and orders, see Watkins v. Mabus, 771 F. Supp. 789 (S.D. Miss.), aff'd mem. in part and vacated in part as moot, ___ U. S. __ , 112 S. Ct. 412, 116 L.Ed.2d 433 (1991), and Watkins v. Fordice, 791 F. Supp. 646 (S.D. Miss. 1992), and need not be repeated here.

are promptly to notify the court as to those motions they desire to be considered and to withdraw the remaining motions." At the time of the court's order in that regard, there were a number of motions by plaintiffs pending, including, inter alia, a motion for class certification, a motion to withdraw their motion for class certification, a motion for leave to file a supplemental or second amendment to their complaint, and a "motion for preliminary and permanent injunctions and for injunctive and declaratory relief setting aside results and certifications of 1991 and March 1992 legislative elections and scheduling legislative elections for late 1992." Though plaintiffs failed to comply with the court's order requiring "prompt" notification of the plaintiffs' position regarding their motions, plaintiffs now advise in their rebuttal brief that their motions have either been withdrawn and/or are moot and thus do not need to be withdrawn. To reiterate, the court ordered that the parties "notify the court as to those motions they desire to be considered and to withdraw the remaining motions." Plaintiffs have not complied with the court's order and, in order to avoid any future confusion, the three-judge court will remain convened until such time as plaintiffs have formally complied with the court's order. Therefore, plaintiffs' motion to dissolve the three-judge court will at this time be denied.

While a single judge has the authority to rule on plaintiffs' motion for an award of attorneys' fees and expenses, since this three-judge court remains convened, it may properly address and resolve that motion. See Connor v. Winter, 519 F. Supp. 1337 (S.D. Miss. 1981). Turning now to that motion, the court, based on the memoranda and information provided, makes the following findings and conclusions.

Plaintiffs' present motion asserts that as prevailing parties in this litigation, they are entitled to recover their attorneys' fees and expenses from defendants. Defendants oppose plaintiffs' motion for attorneys' fees and expenses contending that plaintiffs are not prevailing parties within the meaning of the applicable attorneys' fee statutes. They assert alternatively that if

the court should conclude that plaintiffs are indeed prevailing parties, then the court should award an amount substantially less than that requested by plaintiffs since the hours claimed by plaintiffs' attorneys are unreasonable and excessive, their hourly rates are unreasonably high, and their expenses are not properly compensable and/or are unreasonable and excessive.

PREVAILING PARTIES

Plaintiffs' entitlement to an award of attorneys' fees is determined by reference to 42 U.S.C. § 1988 and 42 U.S.C. § 1971(e), which provide for an award of reasonable attorneys' fees to prevailing plaintiffs in civil rights litigation and Voting Rights Act lawsuits.[4] In Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 109 S. Ct. 1486, 103 L.Ed.2d 866 (1989), the Supreme Court attempted to clarify the proper standard to be used in determining whether a party has "prevailed" such that the party is eligible for an award of attorneys' fees. A prevailing party, the Court stated, "must be one who has succeeded on any significant claim affording it some of the relief sought, either pendente lite or at the conclusion of the litigation," 489 U.S. at 791, 109 S. Ct. at 1492, so that "there is a resolution of the dispute which changes the legal relationship between [plaintiffs] and defendant[s]," id. at 1493. As is pertinent to the case at bar, the Fifth Circuit has explained:

> [I]n the absence of a judgment, a party may be entitled to fees as a prevailing party "if its ends are

[4]Section 1988 provides, as is pertinent here:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 19731(e) similarly provides:

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

accomplished as a result of the litigation." Williams v. Leatherbury, 672 F.2d 549, 550 (5th Cir. 1982). Thus, a plaintiff must establish two elements: (1) that the goal of the law suit was achieved, and (2) that the suit itself caused the defendant to remedy the discrimination. Savidge v. Fincannon], 836 F.2d [898,] 904-05 [(5th Cir. 1982).

A plaintiff who successfully shows both these elements has made a prima facie case that it is a prevailing party, entitled to attorney's fees. The burden of proof then shifts to the defendant, who can challenge the entitlement only by showing that its conduct was a "wholly gratuitous response to a lawsuit that lacked colorable merit." Hennigan v. Ouachita Parish School Bd., 749 F.2d 1148, 1153 (5th Cir. 1985).

Associated Builders & Contractors Inc. v. Orleans Parish School, 919 F.2d 374, 378 (5th Cir. 1990).

In this case, there is little question but that the plaintiffs' goal was achieved, as the Mississippi Legislature ultimately passed a redistricting plan which met the criteria demanded by plaintiffs, most significantly the creation of the maximum possible number of majority black legislative districts. It is the second of the elements described by the Fifth Circuit, though, which gives the court pause. The court is not persuaded that plaintiffs' lawsuit prompted the Mississippi Legislature's having devised and passed a redistricting plan in its 1992 regular session, as that eventuality was inevitable under Mississippi law.[5] Additionally, it is noteworthy that plaintiffs were not successful in securing relief from this court. Plaintiffs came before the court seeking, primarily, an order

[5]Article 13, Section 254 of the Mississippi Constitution mandates legislative redistricting during the regular legislative session in the second year following the decennial census, failing which the governor must reconvene the legislature in a special apportionment session during which it would be "the mandatory duty of the legislature to adopt a joint resolution of apportionment." Should that effort fail, an apportionment commission would be convened, whose sole function would be to apportion the state into legislative districts.

enjoining the 1991 legislative elections.[6] Not only was their request for that injunctive relief denied, but the court ordered, over plaintiffs' strenuous objection, that interim elections proceed under the 1982 legislative apportionment plan. This court denied a motion by plaintiffs for a stay, and on appeal by plaintiffs, the United States Supreme Court similarly denied their stay request and summarily affirmed this court's ruling that elections be held under the 1982 plan. Moreover, this court rejected plaintiffs' contention that the law required apportionment which resulted in the creation of the maximum number of electable black majority districts. Watkins v. Mabus, 771 F. Supp. 789, 806 (S.D. Miss. 1991).[7] Yet in spite of the court's opinion in that regard, the legislature passed apportionment plans which satisfied plaintiffs' objectives. It could certainly be reasonably contended that the legislature's action was, in fact, a "gratuitous response" to plaintiffs' lawsuit, since the court had given no indication that plaintiffs would secure such wholesale relief in this judicial forum, and in fact, had forecast little chance of plaintiffs' securing a court-ordered plan which satisfied their agenda.[8] Nevertheless, and though it is in the court's

[6]Plaintiffs' suit included allegations that the 1982 apportionment schemes for the Mississippi House of Representatives and Mississippi Senate were unconstitutionally malapportioned and that the 1991 House and Senate apportionment plans could not be implemented as they had not been administratively or judicially precleared. However, those were hardly matters of contention between the parties. These facts were conceded by defendants from the outset, so it can not realistically be said that plaintiffs "won" these points.

[7]The court stated: "It is doubtful whether Gingles held, as plaintiffs suggest, that the amended Voting Rights Act § 2 requires that states go beyond the requirement of non-discrimination in order to create as many non-white majority districts as possible." Watkins, 771 F. Supp. at 806. The court further observed that "[w]hile the creation of 40 black majority districts may be an acceptable legislative goal, even if it means creating a significant number of non-compact districts, if is not a goal that this court must, or necessarily should, implement as interim relief." Id.

[8] Plaintiffs characterize defendants' having acceded to plaintiffs' demands as an "abdication [by defendants] of their position that plaintiffs were not entitled to the maximum number of electable black majority districts." It does not follow, however, from the mere fact that defendants ultimately succumbed to plaintiffs' demands that defendants conceded plaintiffs' entitlement to the relief plaintiffs requested.

opinion a close question, the court will conclude that plaintiffs were the prevailing party since it is likely the case that plaintiffs, and this lawsuit, played a motivating role in shaping the particular apportionment plans which the legislature adopted. Plaintiffs are, therefore, entitled to an award of attorneys' fees and expenses and it devolves upon this court to determine an appropriate compensatory award.

PLAINTIFFS' REQUEST

In arriving at an appropriate fee, the court's first task is to ascertain the number of hours reasonably expended on the litigation, following which the court must determine a reasonable hourly rate for each of plaintiffs' attorneys. By multiplying these two figures, this court arrives at the "lodestar," an amount which "normally provides 'reasonable' attorney's fees within the meaning of" the fee-shifting statutes at issue. Blum v. Stenson, 465 U.S. 886, 897, 104 S. Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). The following represents the fee requests of the various attorneys who represented plaintiffs in this litigation:

Attorney	No. of Hours	Hourly Rate	Totals
Carroll Rhodes	1694.75 hrs.	$ 160.00	$ 271,160.00[9]
Deborah McDonald	441.68 hrs.	135.00	59,626.80
John L. Walker	108.70 hrs.	160.00	17,392.00
Wilbur 0. Colom	146.47 hrs.	125.00	18,308.75
Mike Sayer	229.50 hrs.	95.00	21,802.50
Johnny Parker	99.50 hrs.	135.00	13,432.50
Tommie Green	8.20 hrs.	135.00	1,107.00
LODESTAR			**$ 402,929.55**

Plaintiffs seek a one hundred percent contingency enhancement of the lodestar for total attorneys' fees of

[9]Mr. Rhodes states that he seeks comensation for 1664.75 hours. The time included in Mr. Rhodes' records, however, reveals total of 1694.75 hours, for all of which he presumably seeks to be paid.

$805,359.10. Additionally, plaintiffs request costs and out-of-pocket expenses in the amount of **$61,279.29** as follows:

Attorney	**Totals**
Carroll Rhodes	$ 53,874.91
Deborah McDonald	2,758.90
John L. Walker	2,704.48
Wilbur Colom	1,933.00
Total	**$ 61,279.29**

Thus, plaintiffs seek an award of fees and expenses in the total amount of $866,938.39. After reviewing the memoranda submitted by the parties in connection with plaintiffs' motion, together with the documentary submissions both in support of and in opposition to plaintiffs' request, including a thorough review and analysis of plaintiffs' attorneys' time submissions, the court concludes that plaintiffs are entitled to an award of fees and expenses in the amount of $198,688.23. While this amount is obviously substantially less than that sought by plaintiffs, it is, in the court's view, a reasonable award of attorneys' fees and expenses for plaintiffs' attorneys' work in this case.

ATTORNEYS' FEES

The court must review attorney time records and affidavits to determine the number of hours reasonably expended "with an eye toward disallowing those hours which are excessive, unnecessary, duplicative or insufficiently documented." Beamon v. City of Ridgeland, 666 F. Supp. 937, 941 (S.D. Miss. 1987) (citing Sims v.Jefferson Downs Racing Ass'n, 778 F.2d 1068, 1084 (5th Cir. 1983)). As indicated above, attorney Carroll Rhodes seeks compensation for 1694.75 hours for his services in this case. A careful analysis of his time submissions reveals that many of those hours were expended on services which are not properly

compensable and/or which were excessive in view of the task being performed. The court recognizes that much of Mr. Rhodes' time prior to the commencement of litigation for which compensation is sought was expended on functions legitimately and reasonably related to the advancement of the litigation as, for example, time spent gathering information, defining plaintiffs' criteria and drafting proposed apportionment plans. However, prior to the filing of the lawsuit, Mr. Rhodes spent 257.75 hours on lobbying-related activities and in connection with the Justice Department's Section 5 review of Mississippi's legislative submission. The court is of the opinion that this time is not properly compensable. The fee-shifting statutes which authorize an award of attorneys' fees are concerned with attorneys' fees in connection with an "action or proceeding to enforce" the subject rights. Where an attorney's work is "both useful and of a type ordinarily necessary to advance the civil rights [and/or Voting Rights Act] litigation," Webb v. Board of Education of Dyer County, 471 U.S. 234, 243, 105 S. Ct. 1923, 1929, 85 L.Ed.2d 233 (1985), legal fees for the time expended on that work are recoverable, even though that time is not necessarily directly spent on the litigation. Here, however, plaintiffs' attorneys' legislative lobbying work and their work relating to the Justice Department's review of the State's Section 5 submission were not "necessary" to advance the litigation. See City of Leroy v. Houston, 831 F.2d 576, 582-83 (5th Cir. 1987), cert. denied, 486 U.S. 1008, 108 S. Ct. 1735, 100 L.Ed.2d 199 (1988); Arriola v. Harville, 781 F.2d 506, 511 (5th Cir.), cert. denied, 479 U.S. 820, 107 S. Ct. 84, 93 L.Ed.2d 38 (1986). Indeed, as Mr. Rhodes' time records indicate, as late as June 22, 1991, after months of lobbying and working with the Legislature and after participating in the Section 5 review, and only one week prior to actually filing the complaint in this cause, plaintiffs had not made the final determination to institute litigation.[10] The time so requested will be disallowed.

[10]An entry in Mr. Rhodes' time submissions on that date reflects a conference, the subject of which was "strategy on filing lawsuit and whether to file."

Even after the court's disallowance of Mr. Rhodes' time spent in connection with lobbying and Section 5 preclearance work, there remain 173.75 pre-litigation hours for which Mr. Rhodes seeks compensation. The court is of the opinion that this is an excessive amount of time for the performance of the tasks reasonably necessary to the commencement of this action. Accordingly, the court will reduce by fifty percent the number of prelitigation hours for which compensation will be awarded. Mr. Rhodes' time submissions further reflect 230 hours of "travel time," yet there is no indication to or from where Mr. Rhodes was travelling during this time.[11] These hours will be disallowed. The court will also disallow 4 hours expended by Mr. Rhodes in press conferences. There is simply no basis for causing compensation for such press conferences to be borne by defendants.

It has been consistently recognized that the losing litigant should neither expect nor be required to pay an attorney's rate for services which are clerical in nature and could be performed by non-lawyers. See, e.g., Beamon, 666 F. Supp. at 941. As his time records demonstrate, Mr . Rhodes expended at least 23 . 5 hours performing tasks which could easily have been accomplished by clerical personnel, such as computing population deviations, color coding precinct maps and filing court documents. These hours will be compensated,

[11]The only entry in Mr. Rhodes' submission which reflects his travel destination ir a six-hour travel time entry which indicates that this pre-litigation travel was to Greenville, Mississippi for the purpose of attending a public hearing relating to the legislature's redistricting efforts. As Mr. Rhodes' time in connection with that hearing has been disallowed by the court, then certainly his travel to that hearing would not be compensable. The remaining 224 hours of travel time is derived from 112 separate entries of two-hour travel time each. Many of those entries were, like the six-hour travel time entry, expended in relation to activities which are not compensable in any event. However, not even one of these 112 entries reflects to or from where Mr. Rhodes was traveling. The court initially deduced that Mr. Rhodes was seeking tor recover for his time spent in travel from his law office in Hazlehurst, Mississippi to Jackson, Mississippi. However, in a supplemental affidavit provided by Mr. Rhodes in response to defenants' opposition to plaintiffs' motion, Mr. Rhodes states, I did not include in my itemized bill for services rendered in the above captioned case any time I spent commuting to and from my office." The court, it seems, was incorrect in its deduction, and is thus at a complete loss to divine where or why Mr. Rhodes was traveling during these 224 hours.

but at the hourly rate of $40, a rate which the court considers to be reasonable for such clerical services.

An additional 67.5 hours will be deducted from the time claimed by Mr. Rhodes as his time records reflect substantially duplicative entries from August 5, 1991 through August 15, 1991. Page 62 of his submission includes 67.5 hours claimed to have been expended during those dates while pages 63 and 64 reveal an additional 81.75 hours spent on virtually those same tasks during those dates. This is obviously an error by Mr. Rhodes as he could not possibly have worked the number of hours claimed.[12]

In addition to the foregoing, a comprehensive review of all plaintiffs' attorneys' time submissions reveals in two areas duplication of effort and/or excessive number of hours for which compensation is sought. More specifically, six of plaintiffs' attorneys spent, collectively, 78.3 hours in their efforts relating to the Joint Committee defendants-intervenors' motion to intervene and attempting to set aside the court's order allowing intervention.[13] And, five of plaintiffs' attorneys expended 272.5 hours[14] in efforts in attempting to secure relief from this court's order of August 9, 1991.[15]

[12]While Mr. Rhodes does claim to have worked on this case close to 24 hours a day on a number of occasions during this litigation, it would have been impossible for him to have worked the number of hours reflected on his time sheets for this period of time during August 1991 as demonstrated by the following.

Date	No. of Hours Claimed
8/6/91	28 hours
8/8/91	34 hours
8/9/91	31 hours
8/12/91	34 hours

[13]These attorneys' time sheets demonstrate the following time was spent by each in relation to this matter:

Rhodes	20.0 hours
Sayer	12.0 hours
Parker	23.0 hours
Green	8.0 hours
Walker	5.2 hours
McDonald	10.1 hours

[14] These hours are as follows:

Rhodes	177.5 hours
Sayer	15.0 hours
Parker	9.5 hours
Colom	6.0 hours
McDonald	64.5 hours

Not only were plaintiffs unsuccessful in their efforts to prevent intervention and to secure a stay of this court's orders, or any substantive relief for that matter, but the time they spent in connection with these matters was, in the court's view, if not substantially duplicative, certainly grossly excessive in light of the nature of their tasks. For that reason, the court concludes that the number of hours of each attorney for time spent on these matters should be reduced by fifty percent.

As was the case with Mr. Rhodes, Deborah McDonald's time records reveal that she seeks compensation for a number of prelitigation hours for lobbying and Section 5 review activities. The 26.25 hours so requested will be disallowed by the court. In addition, Ms. McDonald seeks compensation for 5 hours of clerical work, which the court will compensate at the rate of $40 per hour. Thirty hours for which McDonald requests an attorney's fee were spent in travel.[16] It has been held that travel time may be compensated at a rate which is less than the reasonable hourly attorneys' fee rate, see Martin v. Mabus, 734 F. Supp. 1216, 1227 (S.D. Miss. 1990); Beamon, 666 F. Supp. at 941, and the court will order that compensation for travel time be awarded at one-half of the hourly rate allowed for Ms. McDonald. The court will similarly reduce the hourly fee awarded for Mr. Colom's 29.5 travel hours and Mr. Sayer's 23.5 travel hours by one-half.

Except as noted above, the hours claimed by each of plaintiffs' attorneys will be allowed, and at this stage, the court is called upon to set a "reasonable" hourly rate to be awarded for each of these attorneys' services. It is with regard to the court's setting of a reasonable hourly rate and plaintiffs' alleged entitlement to an "enhancement" of that rate that plaintiffs seek discovery

[15] These figures represent conservative estimates by the court of the time so utilized by plaintiffs' attorneys. In certain instances, it is difficult to determine whether time entries are related, to these matters and in cases of doubt, the court has resolved that doubt in plaintiffs' favor.

[16] She has not in each instance separately denominated such time in her records as "travel time," though it does appear that the time computed by the court was in fact travel time.

and an evidentiary hearing. Specifically, plaintiffs request that they be granted leave to conduct discovery on: (1) the prevailing market rate for attorney fees in non-contingency complex civil cases and complex contingency civil cases; (2) the necessity of enhancement in civil rights cases; and (3) the market difference between contingency and non-contingency fee cases. The court is of the opinion that such discovery would serve no useful purpose. To the contrary, to permit such discovery would operate only to further delay payment to plaintiffs' attorneys and to needlessly "run up the bill" for their services. The parties have provided a wealth of material in support of their respective positions on plaintiffs' claims for attorneys' fees and to permit discovery on these matters is simply unnecessary. Indeed, the supreme Court has cautioned that a "request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). To grant plaintiffs' request would encourage just that result. The request for discovery will be denied.[17]

In support of their claims for hourly rates ranging from $95 to $160, plaintiffs have submitted affidavits of a number of attorneys to demonstrate the prevailing hourly rates charged by attorneys in the Jackson area. The affidavits of these attorneys reflect hourly rates of $150 to $200 for attorneys with over ten years' experience, and of $100 to $150 for those with four to ten years experience.[18]

In response to plaintiffs' submissions, defendants have

[17]As indicated infra at 19-21, discovery relating to the necessity of a "contingency enhancement" would be to no avail, since recent Supreme Court precedent establishes that such an enhancement is not available in any event.

[18]David Watkins of the Jackson, Mississippi law firm, Brunini, Grahtham, Grower & Hewes, states that the market rate for attorneys in the Jackson area with 10 to 14 years of legal experience who handle complex non-contingency civil cases is $150 per hour. Alveno N. Castilla of the Watkins, Ludlam & Stennis law firm states that the market rates for attorneys with 10 to 14 years' legal experience who handle complex non-contingency civil cases are $165 to $175 per hour, and the rates for those with 5 to 10 years' experience range from $125 to $150 per hour. In 1989, A. Spencer Gilbert, with the law firm, Wise, Carter, Child & Caraway, provided an affidavit in another Mississippi Voting Rights Act case, Martin v. Mabus, in which he opined that lawyers with over 10 years' experience and with expertise in their field would normally charge $150 per hour, but that the rate could be as high as $200 per hour. Attorneys with 8 to 10 years' experience and with expertise in their field would charge between $125 and $145 per hour, and those with 4 to 7 years' experience would charge between $100 and $120 for their work. In that same case, J. Brad Pigott of Watkins, Ludlam & Stennis stated that the normally charged hourly rate for attorneys with 6 to 10 years experience is $120, and is $150 for those with over 10 years of experience. Those affidavits have been provided by plaintiffs in this case, as well.

provided the affidavit of Alan M. Purdie, Special Assistant Attorney General of the State of Mississippi, who states that the usual current hourly rate paid by the State for legal services to private in-state counsel is $90. Defendants have additionally furnished affidavits from attorneys which reflect an hourly rate of $100 being charged in civil rights litigation by one Jackson attorney with eight years' experience and expertise in the field, and by another with over fifteen years' experience and expertise in the field.[19] Finally, defendants have advised that the hourly rate that is being charged the State by counsel for the Joint Committee defendants-intervenors in the case sub judice by its experienced attorneys is $95. The court has considered all of this evidence in arriving at its conclusion that the following represent "reasonable" hourly rates for each of plaintiffs' attorneys:

Attorney	Rate
Carroll Rhodes	$110.00
John Walker	110.00
Deborah McDonald	95.00
Michael Sayer	95.00
Wilbur Colom	95.00
Johnny Parker	95.00
Tommie Green	95.00

In arriving at these figures, the court has considered the evidence submitted by the parties relating to the local rates of attorneys, and has taken into account the experience and expertise of each attorney, the nature and complexity of the case, including the level of skill and expertise required by the case, and the demands imposed on the attorneys by the case.[20]

[19]Dennis Horn, an attorney with over 15 years' experience, submitted in a 1991 school desegregation case, Wallace v. The Natchez-Adams School District, No. W89-0134(B) (S. D. Miss), an affidavit for attorney's fees in which he requested compensation at the rate of "$100 per hour, the market rate." In 1992, Matthew Moore, an attorney with 8 years experience, requested $100 an hour for his work in a § 1983 case involving First Amendment issues, Lakeland Lounge of Jackson, Inc. v. City of Jackson, No. J92-0123(B)(C) (S.D.Miss. 1992).

Plaintiffs assert that "[i]n contingency fee cases, such as this, the lodestar (which is the reasonable hourly rate multiplied by the reasonable number of hours) is enhanced 100-300% to compensate for the risk of not succeeding, the delay in payment, exceptional results, undesirability of the case, preclusion of other employment, etc." Plaintiffs urge that each of these factors is present in the case at bar, and they are therefore entitled to a "market rate contingency enhancement" of one hundred percent. The court must conclude otherwise. Most of the factors cited by plaintiffs are not "enhancement" factors at all, but rather are factors that are taken into account in determining the reasonableness of the hours expended and the attorneys' hourly rates. See Hensley, 461 U.S. at 434 n.9, 103 S. Ct. at 1940 n.9; Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). That is, they are considerations in setting the lodestar, not in enhancing the lodestar. Further, though it was until recently widely accepted that the risk of non-compensation could provide a basis for applying a multiplier or enhancement to th lodestar, the Supreme Court has now explicitly rejected that view holding that "enhancement for contingency is not permitted under ... fee-shifting statutes" such as that at issue here. City of Burlington v. Dague, ___ U.S.___ , 112 S. Ct. 2638, 120 L.Ed.2d 449 (1992).[21] Plaintiffs respond to Dague's clear preclusion of contingency enhancement by arguing that

[20]Evidence submitted by plaintiffs in opposition to defendants' response to their motion confirms, in the court's opinion, that the hourly rates at which the court has arrived for plaintiffs' attorneys' services are reasonable. The exhibits plaintiffs have furnished show the following. As of June 1991, John Price of the law firm, Thomas, Price, Alston, Jones & Davis, charged the State at the rate of $125 per hour. The time of Barry Zirulnik and Cynthia Sarthou of that firm was charged at the rates of $100 and $80, respectively. The firm of Bennett, Lotterhos, Sulser & Wilson, P.A. billed the State at the rate of $100 per hour in 1991. And for services rendered for the State in a Voting Rights Act case relating to judicial redistricting, the Washington, D. C. law firm of Dickstein, Shapiro & Morin, during 1988 charged the State hourly rates ranging from a low of at least $70 to a high of $125.

they are not seeking a enhancement of the "lodestar," but rather are seeking an enhancement of their hourly rates, a result which they contend is consistent with Dague. In Dague, the Court explained:

> [A]n enhancement for contingency would likely duplicate in substantial part factors already subsumed in the lodestar. The risk of loss in a particular case (and, therefore, the attorney's contingent risk) is the product of two factors: (1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits. The second factor, however, is ordinarily reflected in the lodestar--either in the higher numbers of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so. Blum, supra. Taking account of it again through lodestar enhancement amounts to double-counting. Delaware Valley II, 483 U.S., at 727- 727 (plurality opinion).

112 S. Ct. at 2641. Plaintiffs suggest that even though the Supreme Court rejected the notion of enhancing a lodestar based on the contingency factor, this passage reflects the Supreme Court's approval of awarding an enhanced hourly rate in contingency cases in arriving at the lodestar. This court believes plaintiffs have misconstrued the point of the passage. The Supreme Court, in this court's view, merely observed that some contingency cases by their nature may require the services of attorneys with greater skill and experience who, by reason of that skill and experience, may command higher hourly rates than less skilled or experienced attorneys. That is, it is not the "contingent" nature of the case, per se, which determines the

[21] Though the issue in Dague was whether, under the fee-shifting provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), or the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365(d), a court may enhance a fee award to an amount above the lodestar to reflect the risk of non-payment, the Court recognized that the language of the statutes under consideration was similar to that of many other federal fee-shifting statutes, including Section 1988, and noted that "our case law construing what is a 'reasonable' fee applies uniformly to all of them." Dague, 112 S. Ct. at 2641.

allowable rate, but rather the skill and experience of the attorney performing the services. In the case at bar, the court has taken into account each of plaintiffs' attorney's skill and experience in arriving at a reasonable hourly rate for his/her services. Plaintiffs' request for a contingency enhancement will be denied.

Plaintiffs suggest that another basis for awarding an enhanced fee is the exceptional level of success they attained. The court cannot conclude that such an enhancement would be appropriate in this case. While the court is persuaded that plaintiffs' efforts contributed to the legislature's redistricting plans for the State, and attained their goal of establishing the maximum number of majority black districts, the court attributes plaintiffs' success to the time extended toward achieving their goal, and has accounted for their success in the computation of hours or which they will receive compensation.[22]

Based on the foregoing, the court finds that plaintiffs' attorneys are entitled to attorneys' fees computed as follows:

Attorney	No. Hours	Rate	Total
Carroll Rhodes	926.23	$ 110.00	$ 101,885.30
	23.50	40.00	940.00
John L. Walker	106.10	110.00	11,671.00
Michael Sayer	192.50	95.00	18,287.50
	23.00	47.50	1,092.50
Johnny Parker	83.25	95.00	7,908.75
Tommie Green	4.20	95.00	399.00
Wilbur Colom	111.62	95.00	10,603.90
	29.50	47.50	1,401.25
Deborah McDonald	344.13	95.00	32,692.35
	30.00	47.50	1,425.00
	5.00	40.00	200.00
TOTAL			**188,506.55**

The court now addresses plaintiffs' claim for costs and expenses.

[22] Moreover, it is again worth noting that plaintiffs' level of success in their efforts before the court was quite low.

EXPENSES

Plaintiffs' attorneys seek an award of costs and reimbursement of out-of-pocket expenses as follows:

Carroll Rhodes	
Filing Fee	$ 120.00
Photocopying	7,586.55
Telecopier	600.00
Business Lunches	732.22
Transportation	
Air Fare	
6/10/91	714.00
8/09/91	828.00
Mileage	
7320 miles @ 22/mile	1,610.40
Taxi	18.00
Brief Printing Costs	
8/91	7,680.65
10/91	244.86
Lodging	104.73
Parking	35.50
Expert Witness Fees	
Sen. Henry Kirksey	6,000.00
Dr. Alan Lichtman	2,200.00
Dr. Richard Engstrom	400.00
Ms. Janaki Hall and Ms. Duana Watkins	25,000.00
Total:	$ 53,874.91
Deborah McDonald	
Transportation	
Mileage	2,491.25
Business Lunches	32.65
Photocopying	235.00

Total:	$ 2,758.90

John L. Walker

Photocopying	
MS Supreme Court opinion	1.00
Document Reproduction	1,607.98
Video Tape	14.05
Secretarial Contract Service	125.00
Travel, meals and lodging	30.50
Postage	125.26
Long Distance Telephone charges	238.19
Investigation Fee	30.00
Shipping Fees	309,50
Telecopier	223.00
Total	$ 2.704.48

Wilbur Colom

Photocopying	331.61
Transportation	
Mileage	445.00
Lodging	342.89
Miscellaneous Per Diem	425.00
Telecopier	448.50
Total	1,933.00
TOTAL	**$61,279.29**

While some of these items are recoverble, many are not.

Plaintiffs are entitled to recover expert witness fees, but only as provided by 28 U.S.C. § 1920 and 28 U.S.C. § 1821.[23] The Supreme Court has held that fee-shifting provisions, such as that applicable here, which restrict the prevailing party's recovery to "attorney's fees,"

rather than to "attorney's fees and expert witness fees," or "reasonable litigation expenses," must be applied in accordance with their clear terms, such that the term "attorney's fees" cannot be read to include expert fees. West Virginia Univ. Hosp., Inc. v. Casey, ___U.S.___, 111 S. Ct. 1138, 1145-47, 113 L.Ed. 2d 68 (1991). Such statutes, the Court held, "convey[s] no authority to shift expert fees." Id. at 1148. The only expert fee recoverable is the $40 per day witness fee provided under § 1920 and § 1821. Id. In the case at bar, three experts testified on plaintiffs' behalf, Alan Lichtman, Sen. Henry Kirksey and Janika Hall. Plaintiffs are entitled to recover the sum of $120 for those witness fees. The remaining $33,480 of Mr. Rhodes' request for expert witness fees must be disallowed.[24]

Mr. Rhodes requests the sum of $7,680.65 for the printing of plaintiffs' jurisdictional statement for filing in the Supreme Court and an additional $244.86 for the printing of a brief opposing defendants' motion to dismiss or affirm. These items must also be disallowed, as Rule 50.3 of the Rules of the Supreme Court specifically states that "[t]he expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable." See Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 957 (1st Cir. 1984); Jordan v. Allain, 619 F. Supp. 98, 116 (N.D. Miss. 1985).

Airfare expenses claimed by Mr. Rhodes in the sum of $1542 appear to be for travel to Washington, D.C. in June 1991 in connection with the Section 5 preclearance review and in August 1991 to deliver appeal papers to the Supreme Court. A charge of $104.73 for lodging and of $18 for taxi charges also appear to have been incurred during Mr. Rhodes' June 1991 travel to Washington. In

[23] 28 U.S.C. § 1920 includes "[f]ees for ... witnesses" in the listing of recoverable costs. 28 U.S.C. § 1821 provides for the payment of a $40 per day witness fee for each day of the witness' attendance at trial.

[24] The Civil Rights Attorneys' Fee Award Act of 1976 was amended last year by the Civil Rights Act of 1991, Pub. L. 102-166 § 113(a), to provide: "In awarding an attorney's fees under subsection (b) of this section in any action or proceeding to enforce a provision of Section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee." 42 U.S.C. § 1988(c). Since this lawsuit is not an action or proceeding to enforce 42 U.S.C. § 1981 or § 1981a, this limited authorization of expert fees is inapplicable, even assuming retroactive application.

the court's opinion, these expenses should not be allowed. The court has previously determined that Mr. Rhodes' services pertaining to the Section 5 submission are not compensable and thus, travel and lodging expenses relating to that matter would not be recoverable. As for Mr. Rhodes' August 1991 travel, there has been no showing that it was necessary that he personally travel to Washington in connection with the appeal and expenses for that travel will similarly be disallowed. For the same reason that the court determined that Mr. Rhodes was not entitled to recover attorney's fees for his travel time, the court now concludes that his claim for mileage expenses relating to that travel will not be allowed. In this regard, Mr. Rhodes seeks recovery of mileage expenses in the amount of $1610.40, representing 7320 miles at a rate of $.22 per mile. As to the vast majority of those miles, 7020, Mr. Rhodes' submissions, as noted supra, do not indicate the nature or reason for his travel, nor his point of departure or destination. Thus, $1544.40 of his claim for mileage expenses will not be allowed. However, a supplemental filing by Mr. Rhodes documenting his time and expenses in responding to defendants' reply to the present motion contains more detailed information concerning his travel and mileage expense; the mileage expense included in this supplemental filing, for $66, will be allowed.

Mr. Rhodes requests reimbursement of $732.22 for "business lunches" on forty-four separate dates. With the exception of meals during the trial of this cause, which totalled $79.40, the court is of the opinion that the charging of this item of expense to the defendants would be inappropriate. Accordingly, $652.82 of Mr. Rhodes' lunch bill will be disallowed.

While a prevailing party is entitled to recover expenses for photocopying, those expenses must be reasonable. Mr. Rhodes requests the sum of $7,586.55, as follows:

2/4/91	Copies of Maps	$ 5.00
3/27/91	Copies of Maps	15.00

4/2/91	Copies of Maps	10.00
4/3/91	Copies of Maps	5.00
6/10/91	Newspaper Article	.40
3/91-3/92	Copies of Pleadings, exhibits, affidavits, declarations, letters and other correspondence 986 pgs X 20=19,720 pgs X $.25/pg	4,930.00
3/92-6/92	Attorney fee exhibits, affidavits, declarations, motions and correspondence, and copies of pleadings 350 pgs X 15 sets=5,250 pgs X $.25/pg	1,312.50
3/91-3/92	Copies of plans 979 pgs x 2 = 1,958 pgs.	489.50
3/92	684 pages at $.25/page	171.00
7/27/92-8/28/92	Copies of cases 251 pages at $.25/page	62.75
8/28/92	12 Copies of Reply w/only 8 copies of exhibits, 2,352 pages at $.25/page	588.00

Mr. Rhodes' submission reflects that for the period from March 1991 to March 1992, twenty copies were made of "pleadings, exhibits, affidavits, declarations, letters and other correspondence." From March 1992 through June 1992, fifteen copies were made of such materials, and by August, twelve copies of these materials were made. The court cannot fathom the necessity of twenty, fifteen, or even twelve copies of each pleading, affidavit, declaration, letter, et cetera. Rather, it seems to the court that no more than nine copies of these materials was necessary.[25] Accordingly, Mr. Rhodes' request for photocopying expenses will be reduced by $3262.00,[26] to

[25] This number would be sufficient to provide copies for each judge on the three-judge panel, each defendant and plaintiffs.

[26] The photocopies of the reply on August 28, 1992 included 12 copies of the brief, which was 34 pages in length. The court has reduced the number of copies of the brief to nine, but has not reduced the number of exhibits.

the sum of $4324.55.

Attorney Deborah Walker seeks reimbursement for airfare in the amount of $897 in connection with travel to Washington, D.C. during June 1991 for services relating to the State's Section 5 preclearance submission to the Department of Justice. The court finds that this expense should be disallowed for the same reasons that this court determined that Mr. Rhodes' request for his airfare on that occasion was not compensable. Ms. McDonald also seeks to recover $95 in mileage expenses for travel from her office in Fayette, Mississippi to Jackson on various dates from April 13, 1991 to June 11, 1991. Her time submissions reflect that the activities in which Ms. McDonald was involved on each of these trips were related either to lobbying and/or the Section 5 submission and therefore, these mileage expenses are not recoverable. The court is of the opinion that the remainder of Ms. McDonald's expenses are recoverable and will be awarded.

Mr. Walker seeks recovery of expenses in the sum of $2,704.48. of that amount, the court finds that he is entitled to recover $2,549.48. Secretarial services, for which Mr. Walker has included a charge of $125, are part of an attorney's overhead and thus charges for such services are not recoverable as an item of cost or expense. A further charge by Mr. Walker for a $30 "Investigation Fee" will not be allowed by the court; there has been provided no indication as to the nature or necessity or relationship of any "investigation" to this litigation.

Mr. Colom requests $1,922 in costs and expenses. The court is of the opinion that he may recover $1,508. His submission includes a number of entries on various dates for "miscellaneous per diem [sic]," totalling $425. While the court will allow Mr. Colom's hotel charge n these dates, the court discerns no basis for granting the recovery of these unspecific, undocumented per diem charges.

Based on the foregoing, costs and expenses will be awarded to plaintiffs' attorneys in the following amounts:

Carroll Rhodes	$ 4,625.45
Deborah McDonald	1,499.25
John L. Walker	2,549.48
Wilbur Colom	1,508.00
TOTAL	**10,182.18**

Thus, plaintiffs are entitled to a total award of attorneys' fees and expenses in the amount of $198,688.23.

As the State is a defendant, and the additional Joint-Committee defendants were sued in their official capacities, the plaintiffs' award of fees and expenses shall be paid by the State of Mississippi. See Martin v. Mabus, 734 F. Supp. at 1227-28.

CONCLUSION

In conclusion, the court orders the following:

(1) That plaintiffs' motion to dissolve the three-judge court and to remand to the managing judge for a determination of their motion for attorneys' fees and expenses is denied. The three-judge court shall remain convened until such time as plaintiff has formally complied with this court's opinion and order of May 21, 992;

(2) That plaintiffs shall recover from the State of Mississippi the sum of $198,688.23 representing their attorneys' fees and expenses as set forth herein.

SO ORDERED this 29th day of October, 1992.

/s/Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES CIRCUIT JUDGE

/s/ Tom Lee
TOM LEE
UNITED STATES DISTRICT/JUDGE

/s/Charles W. Pickering, Sr.
CHARLES W. PICKERING, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. J91-0364(L)

KIRK FORDICE, Governor of
Mississippi, ET AL. DEFENDANTS

THE STANDING JOINT LEGISLATIVE
CoMMITTEE ON REAPPORTIONMENT OF
THE MISSISSIPPI LEGISLATURE; TIM
FORD, In His Official Capacity As
Speaker Of The Mississippi House
of Representatives; And OLLIE
MOHAMED, In His Official Capacity
As President Pro Tempore Of The
Mississippi Senate DEFENDANT-INTERVENORS

(FILED JUNE 12, 1992)

MOTION TO DISSOLVE THREE-JUDGE COURT AND TO REMAND CASE TO MANAGING DISTRICT JUDGE FOR AN AWARD OF ATTORNEY FEES AND EXPENSES AND MOTION FOR AWARD OF ATTORNEY FEES AND LITIGATION EXPENSES AND MOTION FOR ORDER ALLOWING DISCOVERY TO BE CONDUCTED ON ISSUES OF: (1) PREVAILING MARKET RATE FOR ATTORNEY FEES IN NON-CONTINGENCY COMPLEX CIVIL CASES AND COMPLEX CONTINGENCY CIVIL CASES (2) NECESSITY OF ENHANCEMENT IN CIVIL RIGHTS CASES AND (3) MARKET DIFFERENCE BETWEEN CONTINGENCY AND NON-CONTINGENCY FEE CASES AND MOTION FOR EVIDENTIARY HEARING ON ATTORNEY FEES ISSUES

Plaintiffs, **Hollis Watkins,** et al., by and through counsel, pursuant to 28 U.S.C. Section 2284, 42 U.S.C. Sections 1973c, 1973l(e), and 1988, Rule 15 of the Uniform Local Rules of the United States District Courts

this Court on May 21, 1992, move this Honorable Court to dissolve the three-judge court and to remand the case to the managing district judge for an award of attorney fees and litigation expenses, and plaintiffs move the managing district judge to award them attorney fees and litigation expenses and to permit discovery to be conducted on the issues of : (1) prevailing market rates for attorney fees in complex non-contingency civil cases and complex contingency civil cases, (2) the necessity of an enhancement in civil rights cases, especially statewide voting rights cases, and (3) the market difference between contingency and non-contingency fee cases and move for an evidentiary hearing on the attorney fees issues. Plaintiffs will state the grounds for each motion separately.

MOTION TO DISSOLVE THREE-JUDGE COURT AND TO REMAND CASE TO MANAGING DISTRICT JUDGE FOR AN AWARD OF ATTORNEY FEES AND LITIGATION EXPENSES

Plaintiffs move this Honorable Court to dissolve the three-judge court and remand the case to the managing district judge for an award of attorney fees and litigation expenses, and for said motion would show the following:

Plaintiffs filed their motion to convene three-judge-judge Court on July 10, 1991 pursuant to 28 U.S.C. Section 2284 and 42 U.S.C. Section 1973c.[1] The issues presented to the three-judge district court have either

[1] Plaintiffs sought to have a three-judge court convened pursuant to 28 U.S.C. Section 2284(a) because they were "challenging the constitutionality of.... the apportionment" of Mississippi's "legislative body." A three-judge court was required to be convened to hear plaintiffs' constitutional challenge. White v. Regester, 412 U.S. 755 (1973); Chapman v. Meier, 420 U.S. 1 (1975); Magraw v. Donovan., 159 F. Supp. 901 (D. Minn. 1958). And plaintiffs challenged the state's 1991 apportionment scheme on grounds that the requirements of Section 5 of the Voting Rights Act of 1965, as extended, 42 U.S.C. Section 1973c, had not been complied with. A three-judge court was required to be convened to hear plaintiffs' Section 5 challenge as well. Allen v. State Board of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971); Lockhart v. United States, 460 U.S. 125 (1983); Bond v. White, 508 F. 2d 1397 (5th Cir 1975); Jordan v. Allain, 619 F. Supp. 98, 102 n. 2 (N.D. Miss. 1985), Monroe v. City of Woodville, Miss, C.A. No. W88-0029 (B) (three-judge court) (decided July 16, 1990) (opinion attached).

been mooted, withdrawn, or ruled on.[2] The only issue remaining to be decided is the amount of the attorney fees and litigation expense plaintiffs are entitled to.

Plaintiffs, subsequent to their request to convene a three-judge district court, filed a motion to certify a class and motion to withdraw the class certification request, motion for injunctive and declaratory relief determining the 1992 legislative apportionment scheme complies with the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. Sections 1973 and 1973c, and motion to enjoin use of an unprecleared partial Senate plan. Those motions have now been either withdrawn or have become moot or granted in part.

MOTION FOR AWARD OF ATTORNEY FEES AND LITIGATION EXPENSES

Plaintiffs move the managing local judge to award them attorney fees and expenses based on the following: (1) Even prior to filing the instant action, plaintiffs urged the Mississippi Legislature to create electable[3] black majority districts wherever possible.[4] (2) Plaintiffs challenged the Legislature's failure to create the maximum number electable black majority districts in 1991 by filing the instant action.

The instant lawsuit caused the defendants to change their conduct and create the maximum number of

[2]Plaintiffs challenged the constitutionality of the 1982 legislative apportionment scheme on equal protection, one-person one vote and racially discriminatory purpose, grounds. And, plaintiffs challenged the 1991 legislative apportionment scheme on Section 5 and racially discriminatory purpose grounds. As this court recognized, "the parties recognize the 1991 plan is not in issue; because it has not been precleared, it has no effect." Watkins v. Mabus, 771 F. Supp. 789 (S.D. Miss. 1991) (three-judge court), aff'd mem. in part and vacated in part, ___ U.S ___ , 112 S. Ct. 412 (1991). Both the 1982 and 1991 apportionment schemes have been replaced by the 1992 apportionment scheme, which has been precleared, thus mooting the necessity of any decision by this three-judge court on the 1982 and 1991 legislative apportionment schemes.

[3]Plaintiffs defined electability, generally, as a district containing a black voting age population of 60% or more. See Statement of Senator Alice Harden attached.

[4]Plaintiffs essentially urged the Legislature to create the maximum number of electable black majority districts.

their conduct and create the maximum number of electable black majority districts.[5] As such, plaintiffs are prevailing parties entitled to an award of attorneys fees and litigation expenses. See Hewitt v. Helms, 482 U.S. 755 (1987); Posada v. Lamb County, Texas, 716 F. 2d 1066, 1071 (5th Cir. 1983). The Fifth Circuit stated in Posada:

> A prevailing party is one whose 'ends are accomplished as a result of the litigation even without formal judicial recognition (citations omitted), and who can show both a causal connection between the filing of the suit and a defendants' action and that the defendants' conduct was required by law."
> Posada, supra at 1071.

Plaintiffs, in the instant action, accomplished their "ends" as a result of the litigation even without formal judicial recognition. Without the lawsuit and plaintiffs' vigorous pursuit of their "ends", the defendants' conduct would not have changed. And, the defendants' conduct was required by law. Plaintiffs are prevailing parties.

a. Lodestar

The lodestar is calculated by taking the number of hours expended on the litigation and multiplying that figure by a reasonable hourly rate.[6] Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The number of

[5]See Declaration of Carroll Rhodes. As stated in Rhodes' declaration, the instant lawsuit and the uncertainly of how this Court and the United States Supreme Court were going to decided the challenges was the motivating factor for the state defendants in changing their conduct and in giving the plaintiffs all the relief they asked for. As such, the causal connection has been established. Savidge v. Fincannon, 836 F. 2d 898, 905 n. 25 (5th Cir. 1988).

[6]Plaintiffs have filed affidavits from attorneys who routinely handle complex civil and civil rights cases and are knowledgeable about reasonable hourly rates for such litigation. However, because the Mississippi federal courts, in the past, have awarded hourly rates in civil rights cases below the market rate, see Martin v. Mabus, 739 F. Supp. 1216, 1229 (S. D. Miss.1990), Islamic Center of Mississippi v. City of Starkville 876 F. 2d 465 (5th Cir. 1989), Neely v. City of Grenada, 624 F. 2d 547 (5th Cir. 1980), plaintiffs request that discovery be permitted and a hearing held to firmly establish the prevailing market rate in complex civil cases, both contingency and non-contingency.

attorneys and law clerks[7] and a reasonable non-contingent hourly rate is as follows:[8]

Name	Position	Hours	Non-Contingent Hourly Rate
Carroll Rhodes	Attorney	1,588.00	$160.00
Deborah McDonald	Attorney	392.18	$135.00
John Walker	Attorney	108.70	$160.00
Wilbur Colom	Attorney	146.47	$125.00
Mike Sayer	Attorney	229.50	$95.00
Johnny Parker	Attorney	99.50	$135.00
Tommie Green	Attorney	8.20	$135.00

In contingency fee cases, such as this, the lodestar is enhanced 100-300% to compensate for the risk of not succeeding, the delay in payment, exceptional results, undesirability of the case, preclusion of other employment, etc. Because there was a risk of not succeeding, a delay in payment, exceptional results achieved, undesirability of the case, and the preclusion of other employment, plaintiffs' counsel are entitled to and request an enhancement, consistent with the market rates for the Jackson legal community,[9] in the

[7]Paralegal and law clerk time is compensable. Blanchard v. Bergeron, 893 F 2d 87, 91 (5th Cir. 1590), citing Missouri v Jenkins, ___ U.S. ___, 109 S. Ct. 2463 (1984).

[8]The customary billable hourly rates for non-contingent cases for Rhodes, McDonald, Walker, Colom, and Sayer fall within the market rate as evidenced by the supporting affidavits of other attorneys and is appropriate to use in calculating the hourly rates. Associated Bldrs & Const. v. Orleans Parish School, 919 F. 2d 374, 379 (5th Cir. 1990), Islamic Center of Mississippi v. City of Starkville, supra at 469, Powell v. C.I.R., 891 F. 2d 1167, 1173 (5th Cir. 1990.) In fact, the market rate for non-contingency cases for these attorneys is $160.00 per hour.

[9]Plaintiffs submit affidavits from other attorneys in this as well as other cases as evidence of the market rate for contingency fee cases.

following amounts for the following attorneys:

Attorney	Non-contingency hourly	Market rate contingency enhancement	Contingency hourly rate
Carroll Rhodes	$160.00	100%	$320.00
Deborah McDonald	$135.00	100%	$270.00
John Walker	$160.00	100%	$320.00
Wilbur Colom	$125.00	100%	$250.00
Mike Sayer	$95.00	100%	$190.00
Johnny Parker	$135.00	100%	$270.00
Tommie Green	$135.00	100%	$270.00

Plaintiffs' counsel are entitled to and seek a lodestar, at the contingency rate for complex civil rights cases, in the following amounts:

Attorney	Hours expended	Contingency fee hourly rate	Lodestar
Carroll Rhodes	1,588.00	$320.00	$508,160.00
Deborah McDonald	392.18	$270.00	$105,888.60
John Walker	108.70	$320.00	$34,784.00
Wilbur Colom	146.47	$250.00	$36,617.50
Mike Sayer	229.50	$190.00	$43,605.00
Johnny Parker	99.50	$270.00	$26,865.00
Tommie Green	8.20	$270.00	$2,214.00
TOTAL LODESTAR			**$758,134.10**

Thus, plaintiffs are entitled to reasonable attorneys

fee in the lodestar amount as stated above:[10]

b Litigation Expenses

Plaintiffs are entitled to recover their reasonable litigation expenses in the amount of $60,399.43.[11] Martin v. Mabus, supra at 1230-31; Associated Builders v. Orleans Parish School, supra, at 380 ("All reasonable out-of-pocket expenses; including charges for photocopying, paralegal assistance, travel, and telephone, are plainly recoverable in section 1988 fee awards because they are part of the costs normally charged to a fee-paying client.")

[10]Courts should award attorneys fees in a manner consistent with that which the local legal market pays. Pennsylvania v. Del. Valley Citizens' Council, 483 U.S. 711, 731-734 (1987) (opinion of J. O'Connor). "First, district courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market." Pennsylvania v. Del. Valley, supra at 733. Plaintiffs, here, clearly established that contingency fee cases, within the local legal market, (see Martin v. Mabus, supra, 1225-26), are treated, as a class, differently from non-contingency fee cases. In essence, counsel's customary billable hourly rates are enhanced 100-300% in contingency fee cases. And, plaintiffs have established that the customary billable hourly rates for lawyers of comparable skill and experience in the Jackson legal market is $130-160 per hour for complex civil cases. Thus, plaintiffs have established the lodestar amount for complex contingency fee civil rights cases.

[11]The litigation expenses are itemized and attached to the various counsels' affidavits and declarations. Those expenses are as follows:

Attorney	Litigation Expenses
Carroll Rhodes	$53,071.38
Deborah McDonald	2,523.90
John Walker	2,704.48
Wilbur Colom	2,099.67

MOTION FOR ORDER ALLOWING DISCOVERY TO BE CONDUCTED ON ISSUES OF: (1) PREVAILING MARKET RATE FOR ATTORNEY FEES IN NON-CONTINGENCY COMPLEX CIVIL CASES AND COMPLEX CONTINGENCY CIVIL CASES, (2) NECESSITY OF ENHANCEMENT IN CIVIL RIGHTS CASES, AND (3) MARKET DIFFERENCE BETWEEN CONTINGENCY AND NON-CONTINGENCY FEE CASES

Plaintiffs move the managing district judge for an order allowing them to conduct discovery on the issues of: (1) prevailing market rates for attorney fees in non-contingency complex civil cases and complex contingency civil cases, (2) the necessity of an enhancement in civil rights cases, this case in particular, and (3) the market difference between contingency and non-contingency fee cases on the following grounds:

Where issues are in dispute[12] concerning market rates for attorneys in contingency and non-contingency fee cases, discovery is permissible. Naismith v. Professional Golf association, 85. F.R.D. 552, (N.D. Ga. 1979).

The local district courts have ignored documentory evidence concerning market rates for attorneys in both contingency fee and non-contingency fee cases opting to decide attorney fees based on precedent.[13] Through discovery plaintiffs would be able to establish the prevailing market rate in attorney fee cases.

[12]Based on past litigation in attorney fee cases, plaintiffs anticipate the state to contest plaintiffs' documentary evidence concerning the market rate for cases such as the instant case.

[13]The Fifth Circuit has held:

> When an attorney's customary billing rate is the rate at which the attorney requests the lodestar be computed and that rate is within the range of prevailing market rate, the court should consider this rate when fixing the hourly rate to be allowed.

Powell v. C.I.R., supra at 1173, quoting Islamic Center of Mississippi v. City of Starkville, supra at 469. Nevertheless, local district courts have ignored market rate evidence and relied on precedence. See Martin v. Mabus, supra at 1229. Compare affidavits in Martin v. Mabus, supra, attached. However, the market rate and not precedence should be the determining factor in attorney fees litigation. Pennsylvania v. Del. Valley Citizens' Council, supra, at 731-35.

Plaintiffs have been unable to obtain affidavits voluntarily, concerning market rates, from some Jackson law firms, thereby requiring discovery to be conducted on this issue.

MOTION FOR EVIDENTIARY HEARING ON ATTORNEY FEES ISSUES

Plaintiffs move this Honorable Court for an evidentiary hearing on the attorney fees issues on the following grounds.

It is anticipated that the state defendants[14] will dispute the hourly rates and hours claimed by the plaintiffs as well as the market enhancement. Where, as it is anticipated here,[15] that "facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award." Blum v. Stenson, 465 U.S. 886, 892 n. 5 (1984), citing with approval City of Detroit v. Grinnell Corp., 495 F. 2d 448, 472-473 (2nd Cir. 1974).

An evidentiary hearing would establish what the prevailing market rate is for non-contingency fee case and how that rate is enhanced by a multiplier in contingency fee cases and how awards by the district courts, in the past, to prevailing parties, have been artifically low.

WHEREFORE, PREMISES CONSIDERED, plaintiffs move this Honorable Court to: (a) enter an Order dissolving the three-judge district court and remanding the case to the managing district judge for an award of attorney fees and litigation expenses; and plaintiffs move the managing district judge to: (b) award plaintiffs a reasonable attorneys fee and litigation expenses in this action; (c) enter an order allowing

[14]Plaintiffs contend that attorney fees should "be paid by the State of Mississippi." Martin v. Mabus, supra at 1227-28, and the cases cited therein.

[15]Plaintiffs anticipate a dispute as to the facts concerning the attorney fees issues because plaintiffs attempted to settle the attorneys fees with the state defendants, [see letter from Carroll Rhodes to Honorable Mike Moore and Hubbard T. Saunder, IV, Esquire, dated March 18, 1992 attached], but the state defendants refused to even attempt to settle the attorney fees question.

plaintiffs to conduct discovery on the issues of: (1) prevailing market rates for attorneys in non-contingency complex civil cases and complex contingency civil cases; (2) the necessity of an enhancement in civil rights cases, especially voting rights cases such as the instant case, and (3) the different treatment in the market between contingency and non-contingency fee cases; and (c) to allow an evidentiary hearing to be conducted on the issue of attorney fees.

And, plaintiffs move this Court for an Order allowing plaintiffs to dispense with the requirement of filing a brief with those motions since the authorities for the motions are cited herein.

This the 12th day of June, 1992.

HOLLIS WATKINS, ET AL.
PLAINTIFFS

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CERTIFICATE OF SERVICE

I, Carroll Rhodes, hereby certify that I have this day mailed, by the United States Mail, a true and exact copy of the above and foregoing Motion to each of the following:

Hon. Mike Moore
Attorney General
Stephen J. Kirchmayr, Esq.
Deputy Attorney General
Giles W. Bryant, Esq.
Special Assistant Attorney General
Post Office Box 220
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This the 12th day of June, 1992.

/s/Carroll Rhodes
CARROLL RHODES

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATKINS, ET AL.
Individually And On Behalf
Of All Others Similar Situated

VS. CIVIL ACTION NO. J91-0364 (L)

KIRK FORDICE, Governor of
Mississippi, ET AL. DEFENDANTS

THE STANDING JOINT LEGISLATIVE
COMMITTEE ON REAPPORTIONMENT OF
THE MISSISSIPPI LEGISLATURE; TIM
FORD, In His Official Capacity As
Speaker Of The Mississippi House
Of Representatives; And OLLIE
MOHAMED, In is Official Capacity
As President Pro Tempore Of The
Mississippi Senate, ET AL.
DEFENDANT-INTERVENORS

(FILED AUGUST 28, 1992)

PLAINTIFFS' REPLY TO STATE DEFENDANTS' AND JOINT COMMITTEE DEFENDANTS-INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEY FEES AND LITIGATION EXPENSES AND MOTION FOR ORDER ALLOWING DISCOVERY TO BE CONDUCTED ON ISSUES OF: (1) PREVAILING MARKET RATE FOR ATTORNEY FEES IN NON-CONTINGENCY COMPLEX CIVIL CASE AND COMPLEX CONTINGENCY CIVIL CASES, (2) THE NECESSITY OF ENHANCEMENT IN CIVIL RIGHTS CASES, AND (3) MARKET DIFFERENCE BETWEEN CONTINGENCY AND NON-CONTINGENCY FEE CASES AND MOTION FOR EVIDENTIARY HEARING ON ATTORNEY FEES ISSUES

Plaintiffs, **HOLLIS WATKINS, Et Al.**, by and through counsel, respectfully submit this reply to the State Defendants' and Joint Committee Defendants-Intervenors' responses in opposition to plaintiffs' motion for award of attorney fees and litigation expenses and motion for order allowing discovery to be conducted on issues of: (1) prevailing market rates for attorney fees in non-contingency complex civil cases and complex contingency civil cases, (2) the necessity of an enhancement in civil rights cases, and (3) market difference between contingency and non-contingency fee cases, and motion for an evidentiary hearing on attorney fees issues. The defendants and defendants-intervenors will be referred to hereinafter as defendants since both parties have adopted the same position.

1. In reply to defendants opposition to plaintiffs motion, plaintiffs attach and incorporate herein by reference the following exhibits:

Exhibit 1	
pp. 1a-2a	List of witnesses who testified at hearing before the Joint Legislative Committee on Reapportionment in November, 1991.
Exhibit 2	
pp. 3a-29a	Transcript of proceedings before the Mississippi Standing Joint Legislative Committee on Reapportionment held on April 13, 1991.
Exhibit 3	
pp. 30a-95a	Comment letter under Section 5 of the Voting Rights Act from Carroll Rhodes to Honorable John R. Dunn dated June 11, 1991 with exhibits attached.
Exhibit 4	
pp. 96a-102a	Testimony of Mr. Wayne Parker at the trial held on July 31, 1991.
Exhibit 5	
pp.103a-106a	Table of population and voting age population by race for the current districts for the House of Representatives passed by the Mississippi Legislature in February, 1992 and precleared by the United States Attorney General on March

Exhibit 6 30, 1992.
pp. 107a-110a Table of population and voting age population by race for the current districts for the Mississippi State Senate as passed by the Mississippi Legislature in February and April, 1992 and precleared by the United States Attorney on March 30, 1992 and May 8, 1992.
Exhibit 7
pp. 111a-130a Selective explanatory listing for attorney fees paid by selective state agencies for fiscal years 1990, 91, and 92.
Exhibit 8
pp. 131a-154a Selective billing records by the law firm of Crosthwait Terney Noble and Allain to the Mississippi Attorney General and the Standing Joint Legislative Committee on Reapportionment for years 1990 through 1992.
Exhibit 9
pp. 155a-160a Selective billing records from the law firm of Phelps Dunbar for the Standing Joint Legislative Committee on Reapportionment for the year 1991.
Exhibit 10
pp. 161a-162a Letter from John Price of Thomas Price Alston Jones & Davis stating the hourly rate to be charged the State of Mississippi for work, done for the Mississippi State Highway Commission.
Exhibit 11
pp. 163a-166a Selective billing statement from Bennett Lotterhos and Sulser dated July 31, 1991 showing hourly billing rate to be charged by the firm for work done for the Department of Environmental Quality.
Exhibit 12
pp. 167a-169a Billing records from Covington and Burling dated November 14, 1991.
Exhibit 13
pp. 170a-172a Billing records from Butler Snow O'Mara

Steven and Cannada to Dick Molpus, Secretary State, dated October 18, 1990.

Exhibit 14
pp. 173a-177a Billing records from Watkins Ludlam and Stennis to Stephen J. Kirchmayr, Deputy Attorney General, dated April 2, 1991.

Exhibit 15
pp. 179a-193a Billing records from Dickstein Shapiro & Morin to the State of Mississippi for work done in 1988.

Exhibit 16
pp. 194a-196a Affidavit of John Maxey in **Pendleton v. Hood**

2. The defendants disingenuously argue that plaintiffs are not prevailing parties because, as stated by the defendants, "plaintiffs have failed to demonstrate that their lawsuit caused the enactment of the 1992 redistricting of the Mississippi House of Representatives and Senate, and they have failed to demonstrate that 1992 redistricting was required as a matter of law." The defendants ignore the fact that plaintiffs presented four distinct claims to the court in their original complaint: (1) that the 1982 apportionment schemes for the Mississippi House of Representatives and the Mississippi Senate were unconstitutionally malapportioned under the 14th Amendment to the United States Constitution; (2) that the 1991 House and Senate apportionment schemes did not receive administrative or judicial preclearance and were, therefore, unenforceable as a matter of law; (3) that the 1982 apportionment schemes resulted in dilution of black voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S. C. Section 1973; and (4) that the 1982 apportionment schemes for the Mississippi House of Representatives and Mississippi Senate were gerrymandered for a racially discriminatory purpose in violation of the 14th and 15th Amendments to the United States Constitution. As relief, plaintiffs requested a declartory judgment that the actions of the defendants violated Sections 2 and 5 of the Voting Rights Act of 1965 and the 14th and 15th Amendments to

use of the 1991 apportionment schemes for the Mississippi House and Mississippi Senate as violative of Section 5; injunctive relief against use of the 1982 apportionment schemes for the Mississippi House of Representatives and the Mississippi Senate as violative of the 14th Amendment one person one vote principal and Section 2 of the Voting Rights Act; an "order rescheduling the qualifying deadline for candidates for legislative elections ... and order into effect for elections to be held on September 17, 1991 and November 5, 1991 court ordered or court approved reapportionment plans for the Mississippi State Senate and Mississippi Houses of Representative that do not result in the dilution of black voting strength in Mississippi, and order that the persons so elected and certified as the winners of legislative general elections held on November 5, 1991 shall serve a regular four (4) year term or shorter term set by the court, and order that the defendants present legislatively enacted and precleared reapportionment plans for use in all future legislative elections after preclearance is obtained." In light of this court's rulings, the chronology of events, and the defendants ultimate abdication of their position that plaintiffs were not entitled to the maximum number of electable black majority districts, their arguments to the court to the contrary now are ludicrous. This court, in **Watkins v. Mabus**, 771 F. Supp. 789, 791 (S. D. Miss 1991), held that "the requested relief is **GRANTED IN PART and DENIED IN PART**)". The court went on to state that, "[a]lthough the deviation levels using existing districts would certainly be unconstitutional if this court were adopting a permanent reapportionment plan," Id at 804, "[w]e would not consider nor would the parties suggest usage of the 1982 plan if we were implementing a permanent plan." Id at 807. In essence, this court granted plaintiffs request for a permanent injunction against usage of the 1982 plans as permanent plans because those plans were unconstitutionally malapportioned. In fact, the State Board of Election Commissioners, through the Attorney General, admitted in paragraph 34 of their answer that the 1982 apportionment schemes for the Mississippi House of

Representative and the Mississippi Senate were unconstitutionally malapportioned. Even the defendant-intervenors admitted, in paragraphs 34 and 35 of their answer, the statistical data necessary to establish that the 1982 apportionment schemes for both houses of the legislature was correct and the 1982 schemes would be unconstitutional. With these admissions, this court in essence found that the 1982 apportionment schemes for the Mississippi House of Representatives and Mississippi Senate were unconstitutionally malapportioned and enjoined use of those plans as permanent plans. The defendants, in their 1992 plans, brought the range of population deviation within acceptable limits. Without peradventure, plaintiffs prevailed on their one person one vote claim.

With respect to plaintiffs' Section 5 claim, the state defendants admitted in paragraph 41 of their answer that "[t]he defendants should be preliminary and permanently enjoined from further enforcing or implementing the unprecleared reapportionment election districts for the Mississippi State Senate and Mississippi House of Representative and from holding elections under the existing unconstitutional House and Senate districts." The state defendants further admitted in paragraph 43 of their answer that "plaintiffs are entitled to an order of this court stating that:... (4) a court ordered or court approved reapportionment plan(s) for the Mississippi State Senate and the Mississippi House Representative to be used for elections scheduled for September 17, 1991 and November 5, 1991... such court ordered plan should remain in effect until the Mississippi legislature enact legislative reapportionment plans and obtain preclearance of such plans pursuant to Section 5 of the Voting Rights Act of 1965, 42, U.S.C. Section 1973c." Defendant Mike Moore, in presenting the testimony of Wayne Parker on July 31, 1991, elicited testimony from Mr. Parker that the defendants and local county officials were implementing the unprecleared 1991 legislative plans. Mr. Parker testified that, "in this year when we started under a new plan trying to locate people, we found people had moved across the street."

(Exhibit 4, page lOa). Mr. Parker went on to state that, " [s]ince we got our House and Senate plans approved, I believe the 2nd of July, my staff has been--Election Commissioners have been working Saturdays and Sundays and at nights. And all we do is sitting there before we dump it in the computer waiting on the House and Senate plan. We have to change it back when we get sub-precincts." (Exhibit 4, page 102a). This testimony verifies that the defendants had already started implementing the unprecleared 1991 plans. It was only after plaintiffs lawsuit was filed that the defendants changed their course of conduct and stopped implementing the unprecleared plans. Thus, plaintiffs were prevailing parties with respect to their Section 5 claim.

Plaintiffs clearly prevailed on their Section 2 vote dilution claim. Long before the Standing Joint Committee on Legislative Reapportionment adopted criteria to use in reapportionment in 1991 and 1992, plaintiffs urged the Committee to adopt criteria that would lead to the creation of the maximum number of electable black districts and that would not dilute black voting strength. (See testimony before the Joint Legislative Committee on Reapportionment submitted by Carroll Rhodes and Henry Kirksey on behalf of the Statewide Reapportionment Steering Committee at the hearing held by the Standing Joint Committee on Legislative Reapportionment in Greenville, Mississippi in November, 1991, pp. 91-101 attached to plaintiffs motion to dissolve three judge court, etc.). Since that time, November, 1991, plaintiffs have consistently urged the creation of the maximum number of electable black majority House and Senate districts and the non-dilution of black voting strength. (See Statement of Senator Alice Harden date April 3, 1991, pp. 87-90 attached to plaintiffs motion to dissolve three judge court, etc.). See also transcript of proceedings before the Mississippi Standing Joint Legislative Committee on Reapportionment held on April 13, 1991, Exhibit 2, pp. 3a-29a. See also Section 5 comment letter from Carroll Rhodes to Honorable John R. Dunn, date June 11, 1991,

Rhodes to Honorable John R. Dunn, date June 11, 1991, Exhibit 3, p. 3a.). Even after plaintiffs filed their lawsuit, and in the face of discouragement from this court, plaintiffs still maintained that they were entitled to, as a remedy, the creation of the maximum number of electable black majority districts. Plaintiffs consistently defineds electable black majority districts as those district containing a black voting age population of 60% or greater. Plaintiffs urged the Mississippi Legislature to fashion a reapportionment plan for the House and one for the Senate that contained the maximum number of electable black majority districts. The Legislature, through June of 1991, ignored plaintiffs request. Plaintiffs, therefore, filed the instant civil action in June of 1991 seeking, inte ralia, the creation of the maximum number of electable black majority districts. It was only as a result of the lawsuit being filed that the defendants settled the case granting plaintiffs the maximum number of electable black majority districts. Plaintiffs prevailed on their Section 2 claim.

With respect to their constitutional claim, this claim was carried forward with the case until the time of settlement. The settlement of the case granted plaintiffs a remedy on their constitutional claim. Therefore, plaintiffs must be considered prevailing parties with respect to their constitutional claim. The defendants overlooked the controlling law within the Fifth Circuit on the issue of whether or not a party is a prevailing party and entitled to an award of attorney fees. In this Circuit, "a plaintiff seeking attorney fees must show that his lawsuit was' a substantial factor or a significant catalyst motivating the defendant to end their unconstitutional behavior." **Savidge v. Fincannon**, 836 F. 2nd 898, 905 n. 25 (5th Cir. 1988), citing **Robinson v. Kimbrough**, 652 F. 2d 458, 466 (5th Cir. 1981). The instant lawsuit was the motivating factor in the defendants ending their unconstitutional and statutorily infirm behavior. "Nothing in the language of Section 1988 conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been

violated." **Savidge v. Fincannon**, at 904 n. 19, citing **Smith v. Robinson**, 468 U.S. 992, 1006, 104 S. Ct. 3457, 3465, 85 L. Ed. 2d 746 (1984); **Maher v. Gagne**, 448 U.S. 122, 129, 100 S. Ct. 2570, 2575, 65 L. Ed. 2d 653 (1980). As the United States Supreme Court has stated, "[t]he constitutional issues remained in the case until the entire dispute was settled by the entry of" the order scheduling elections. **Maher v. Gagne**, supra, 448 U.S. at 131, 65 L. Ed. 2d at 662. This court has even recognized that, "plaintiffs in voting rights cases are entitled to a fee award even "when subsequent remedial action by the defendants effectively moot the controversies after the lawsuit has been filed." **Kirksey v. Danks**, 608 F. Supp. 1448, 1453 (S. D. Miss. 1985), citing, **Connor v. Winter**, 519 F. Supp. 1337, 1340 (S. D. Miss. 1981) (three-judge court). There is no requirement that a plaintiff obtain a judgment granting him or her the full relief requested in order to be determined a prevailing party. **Maher v. Gagne**, supra; **Savidge v. Fincannon**, supra. "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefits the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind." **Texas State Teacher v. Garland School District**, 489 U.S. ___ , 109 S. Ct. 1486, 103 L. Ed. 2d 866, 877 (1989). The plaintiffs succeeded on several significant issues in litigation which achieved all of the benefits they sought in bringing suit. Plaintiffs are clearly prevailing parties. Additional evidence of plaintiffs being prevailing parties in the instant action is the fact that plaintiffs can "point to a resolution of the dispute which change[d] the legal relationship between" plaintiffs and the defendants. **Texas State Teacher v. Garland School District**, supra, 103 L. Ed. 2d at 877. Plaintiffs are clearly entitled to a fee award. The defendants argument to the contrary are without merit.

The defendants argue that the 1992 redistricting plan was not required as a matter of law. They are wrong. This court had found that the 1982 apportionment scheme was unconstitutionally malapportioned as a

permanent plan. The defendants had to craft a plan that met the one person one vote requirement. **Brown v. Thomson**, 462 U.S. 835, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983); **Chapman v. Meier**, 420 U.S. 1, 95 S. Ct. 751, 42 L. Ed. 2d 766 (1975). The defendants were required to fashion a reapportionment plan which met the one person one vote requirement. Also, the defendants were required to obtain preclearance of any reapportionment plan prior to implementing it. **Clark v. Roemer**, ____ , U.S. ____ , 111 S. Ct. 2096, 114 L. Ed. 2d 691 (1991). And, any reapportionment scheme fashioned by the defendants could not dilute black voting strength. **Thornburg v. Gingles**, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986); **Ketchum v. City Council of Chicago**, 630 F. Supp. 551 (N. D. Ill. 1985); **Edge v. Sumter County School District**, 775 F. 2d 1509 (11th Cir. 1985); **Washington v. Tensas Parish School Board**, 819 F. 2d 609 (5th Cir. 1987). The defendants' arguments that their 1992 apportionment scheme did not have to comply with the one person one vote principle or Section 2 of the Voting Rights Act and did not have to be precleared are specious.

The defendants objected to the newspaper articles attached to plaintiffs' motion for award of attorney fees as containing inadmissible hearsay. The defendants are wrong. A statement "offered against a party" which is "the party's own statement in either an individual or a representative capacity... or a statement by a person with the authority to make a statement concerning the subject, or... a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship..." is not hearsay. Fed. R. Evid. 801 (d); **Dugan v. E. M. S. Helicopters, Inc.**,915 F. 2d 1428 (10th Cir. 1990); **United States v. Matlock**, 415 U.S. 164, 172, 94 S. Ct. 988, 39 L. Ed. 2d 242, 250 (1974) ("...the respondent's own out-of-court admissions would surmount all objections based on the hearsay rule both, at the suppression hearing and at the trial itself, and would be admissible for whatever emphasis the trial court reasonably draw...") ("Rule 801 (d) (A) of the...

Federal Rule of Evidence, approved by the Court on November 20 1972, and transmitted to Congress, expressly provides that a party's own statement offered against him at trial is not hearsay"). Statements attributed to Senator Roger Wicker, the Chairman of the Senate Elections Committee, and the Vice-Chairman of the Standing Joint Legislative Committee on Reapportionment, "that at the behest of Lieutenant Governor Eddie Briggs, he had met with the attorney for the black plaintiffs and essentially let him write his own ticket on how black-majority districts would be constructed" is not hearsay. Motion to dissolve three-judge court, etc., p. 120. **United States v. Mandel**, 591 F. 2d 1347, 1367-1368 (4th Cir. 1979). Likewise, where "Wicker openly admitted the deal was cut to get a commitment from the black plaintiffs that the reapportionment plan would not be contested in court" the statement is not hearsay. Motion to dissolve three-judge court, etc., p. 120. See **United States v. Matlock**, supra, 39 L. E. 2d at 250. These admissions by Senator Wicker, a defendant, are not hearsay. As to the remaining newspaper articles, they merely show the chronology of events leading to the adoption of the precleared reapportionment plan. These newspaper articles merely show a history of the litigation. Such references have been normally used by the federal courts in trying to determine whether or not a plaintiff is a prevailing party. See **Kirksey v. Danks**, 608 F. Supp. 1448, 1453-1455 (S. D. Miss. 1985). The newspaper articles are admissible on plaintiffs motion for award of attorney fees.

3. The number of hours claimed by plaintiffs' attorneys are not unreasonable and excessive and should not be reduced. A comparison of the time spent by plaintiffs' six counsel with the time spent by five counsel for just one of the parties, the Standing Joint Legislative Committee on Reapportionment, clearly show that plaintiffs' counsel did not spend an unreasonable or excessive amount of time on the case. Plaintiffs were represented by six (6) attorneys. Throughout the time period for which plaintiffs seek compensation, one

defendant, the Standing Joint Legislative Committee on Reapportionment, was represented by five (5) counsel, Hubbard Saunders, Bill Allain, Champ Terney, Reuben Anderson, and Carlton Reeves. Exhibits 8 and 9, pp. 135a-160a. The State Board of Election Commissioners was represented by three (3) counsel, the Attorney General, Mike Moore, Stephen Kirchmayr, and Giles W. Bryant. Defendant-Intervenors the Standing Committee of Apportionment and Elections of the Mississippi House of Representatives was represented by five (5) attorneys, John Reeves, Williams Harold Jones, J. Dewayne Thomas, Oliver G. Diaz, Jr., and Thomas Reynolds II. Defendants, the Republican Party Executive Committee, was represented by Michael B. Wallace, and the Democratic Party Executive Committee was represented by Jim Warren. All of these attorneys representing the various defendants expended time on this case. The defendants did not have a concerted defense. Each defendant asserted various defenses and various theories of the case to which plaintiffs had to respond. However, for purposes of this comparison, plaintiffs will look at the time spent by the attorneys representing only one defendant, the Standing Joint Legislative Committee on Reapportionment. As shown in the table below, the attorneys representing this defendant spent a total of 708.85 hours in pre-lawsuit time and 1,044.05 hours in time after the lawsuit was filed. This time does not include any time spent defending plaintiffs' request for an award of attorney fees. By comparison, plaintiffs spent only 605 hours in pre-lawsuit time and 1,967.55 hours in time after the lawsuit was filed, defending all of the various defenses brought by the defendants, developing and encouraging the defendants to adopt the criteria which led to the creation of the maximum number of black majority districts (the relief plaintiffs wanted throughout the entire process), advancing their various claims, negotiating a settlement, and in preparation and filing of their motion for award of attorney fees. Plaintiffs had the burden throughout the case which required them to expend more time than the defendant-intervenors, the Standing Joint Legislative

Committee on Reapportionment. Nevertheless, plaintiffs' counsel expended a total of 2,572.55 hours on the case as compared to 1,752.90 hours spent on the case by the defendant-intervenors', the Standing Joint Committee's, counsel. The time spent by the defendant-intervenors', Standing Joint Committee's, counsel does not include any time spent defending the attorney fees motion and very little time in negotiating a settlement. As the record clearly indicates, plaintiffs' counsel negotiated the settlement directly with the defendant-intervenors with the permission of their counsel. A comparison of the time spent on the case by plaintiffs and the Standing Joint Committee's counsel clearly indicate that the time plaintiffs' counsel spent was not unreasonable or excessive.

The defendants argue that plaintiffs' counsel spent excessive time prior to the lawsuit was filed. However, as the record clearly shows, it was plaintiffs' counsel who urged the adoption of criteria which was later used to grant plaintiffs the remedy they sought. Plaintiffs' counsel started the train's engine, put the train on the track, set its course, and directed it to its destination. The time that was spent on the case prior to the lawsuit being filed was necessary in order to achieve the results plaintiffs desired. That time is fully compensable. See **Webb v. Dyer County of Board of Education**, 471 U.S. 234, 243, 105 S. Ct. 1923, 85 L. Ed. 2d 233, 242 (1985); **Kirksey v. Danks**, supra,; **Leroy v. City of Houston**, 831 F. 2d 576 (5th Cir. 1987); **Martin v. Mabus**, 739 F. Supp. 1216 (S. D. Miss. 1990). See the following table for a comparison of the time spent on the case by plaintiffs' counsel with the time spent on the case by the Joint Committee's counsel.

> TABLE OF TIME SPENT BY FIVE (5) Attorneys (not including time for paralegals) representing defendant-intervenors The Standing Joint Legislative Committee on Reapportionment of the Mississippi Legislature; Tim Ford, in his official capacity as Speaker of the Mississippi House of Representatives; and Ollie Mohamed, in his official capacity as President Pro Tempore of the

Mississippi Senate.

Partial Pre-Lawsuit Time
(Time spent before 6-28-91)

Exhibits and Pages	Firm and Attorneys	Atty. Time	Firm Time	Total
Ex. 8 & 9, pp. 135a-160a	Crosthwait, Terney Noble & Allain		572.60	
	Hubbard Saunders	422.35		
	Bill Allain	135.00		
	Champ Terney	15.25		
	Phelps Dunbar		136.25	
	Reuben Anderson and Carlton Reeves	136.25		
Total				708.85

Time spent after lawsuit was filed
(from 6-28-91 to 6-30-92)

Exhibits and Pages	Firm and Attorneys	Atty Time	Firm Time	Total
Ex. 8, pp. 147a-154a	Crosthwait, Terney, Noble & Allain		1,044.05	
	Hubbard Saunders	454.30		
	Bill Allain	394.75		
	Champ Terney	195.00		
Total				1,044.05
Total Pre-lawsuit & Post-lawsuit time for client				1,752.90

Table of Time spent by Plaintiffs' Counsel
Pre-lawsuit time spent by plaintiffs' counsel
(time prior to 6-28-91)

Attorney	Time	Total
Carroll Rhodes	572.75	
Deborah McDonald	32.25 hrs.	
John Walker	0 hrs.	
Wilbur O. Colom	0 hrs.	
Michael Sayer	0 hrs.	
Tomie T. Green	0 hrs.	
Johnny Parker	0 hrs.	
Total		605 hrs.

Post-lawsuit time
(time after 6-28-91)

Attorney	Time	Total
Carroll Rhodes	1,015.25	
Deborah McDonald	359.93	
John Walker	108.70	
Wilbur O. Colom	146.47	
Michael Sayer	229.50	
Tomie T. Green	8.20	
Johnny Parker	99.50	
Total		1,967.55
Total pre-lawsuit and post-lawsuit time for clients		2,572.55

The defendants, interestingly, now argue that six (6) attorneys should not be paid for prevailing in a case. Just in 1990, State Attorney General Mike Moore gladly

paid fourteen (14) attorneys from one law firm, Dickstein Shapiro & Morin, representing the State of Mississippi, the sum of $457,802.99 for approximately one year of work on a Section 5 voting rights case. The attorneys spent more than 2,056.00 hours on the Section 5 case. (Ex. 15, pp. 179a-193a). The case was settled by Attorney General Moore after approximately one year of litigation. He recognized that as many as fourteen (14) lawyers are necessary in a voting rights case. Now, he complains about six (6) attorneys representing clients in a Sections 2 and 5 and 14th and 15th Amendments voting rights case. His arguments about unreasonable, duplicative, and excessive time are specious.

The defendants argue that any award of attorney fees to plaintiffs should be substantially reduced because plaintiffs did not win every motion or prevail upon every sub-issue. Defendants arguments are misplaced. The determination of the amount of a fee to be awarded to plaintiffs does not depend upon whether or not plaintiffs won each motion that was filed. The determining factor is whether or not plaintiffs prevailed upon a claim and the level of success they achieved. The court must then determine the amount of hours reasonably expended in prevailing upon that claim. **Copeland v. Marshall**, 641 F. 2d 880, 892 n. 18 (D. C. Cir. 1980) ("... it sometimes will be the case that a lawsuit will seek recovery under a variety of legal theories complaining of essentially the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a plaintiff did not prevail on one or more of these legal theories. No reduction in fees is appropriate where the issue was all part and parcel of one matter..."). The Supreme Court in **Hensley v. Eckerhart**, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40, 51-52 (1983), recognized:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to litigation as a whole, making it difficult to divide the hours expended on a

> claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discerte claims. Instead the District Court should focus on the significance of the overall relief obtained by the plaintiffs in relation to the hours reasonably expended on the litigation.

The Supreme Court, in essence, expressly rejected the arguments advanced by the defendants here. Essentially, the Supreme Court stated that, "[w]e agree with the District Court's rejection of 'a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. ...Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors.' Id., 461 U.S. at 436 n. 11, 76 L. Ed. 2d at 52 n. 11. This court is compelled, likewise, to reject such tenous arguments.

The defendants also argue that plaintiffs spent an unreasonable, excessive, and duplicative amount of time on the case. That is not true. When compared to the amount of time spent by only one defendant's counsel on the case, it is readily apparent that plaintiff did not spend an unreasonable or excessive amount of time on the case. Plaintiffs' counsels have stated under oath that the time they spent on the case was not duplicative. When looking at the defendants' counsels' time, plaintiffs statements are not only probative but also sobering.

The defendants argue that the time spent by plaintiffs in negotiating and fashioning a settlement was lobbying activity. This argument is frivilous. The defendants admitted, in newspaper publications, that plaintiffs were negotiating a settlement and actually fashioned a settlement of the case.

4. The defendants contest plaintiffs hourly rates. However, the defendants contest only plaintiffs' non-contingent hourly rates. The defendants do not contest plaintiffs contingency hourly rates. A 'higher hourly rate can be charged by an attorney "skilled and experienced" in the matter. City of Burlington v. Dague, 60 U. S. L. W. 4717, 4719 (decided June 24, 1992). In contesting

plaintiffs' hourly rates, the defendants rely upon the affidavits of Hubbard T. Saunders, IV, John Maxey, II, and Alan M. Purdie. Those affidavits are self-serving, contradictory, and in conflict with prior actions by the affiants. On February 22, 1984, John Maxey, II, gave an affidavit in the case of **Pendleton v. Hood**, Civ. Action No. J83-0519(B), wherein he stated that " [t]he prevailing rates charged by lawyers in private practice for litigation in federal court where the fee is not contingent on success are as follows:..." 5-6 years of experience "$60.00-75.00" per hour, and for more than 6 years of experience "$75.00-100.00" per hour. Mr. Maxey went on to state that "[w]here the fee is wholly contingent on success, a reasonable fee would be determined by increasing the non-contingent hourly rate." Ex. 16, pp. 194a-195a. This previous affidavit contradicts Mr. Maxey's affidavit filed in this case wherein he states that he believes "such hourly rates [as $75.00-110.00 per hour] are reasonable." Mr. Maxey further states that he relies upon the Mississippi State Bar Membership Survey results, published in 1989 at pages 41-46, to evaluate his practice. He fails to state that the Bar Survey is taken from members of the bar who have varied years of experience, 0-29 years, and who practice in various areas of the State, from the extreme Northeast and Northwest to the extreme Southwest and Southeast, from rural to urban areas, and from various practices, both routine and complex, and both without litigation and with litigation. This statistical report is therefore skewed and not reliable in determining the appropriate attorney's fees charged by the Jackson, Mississippi legal community for complex litigation in federal court. See **Martin v. Mabus**, 739 F. Supp. 1216 (S. D. Miss. 1990), for the relevant geographical market, and see **Hensley v. Eckerhart**, supra, for relevant product (complexity) market.

Mr. Saunders' law firm, like Mr. Maxey's, enjoys a special economic relationship with the State. His law firm has made several hundred thousand dollars within the past several years representing the State. Furthermore, Mr. Saunders did not state whether or not

he has handled any voting rights cases for protected voters. All of his representation has been for governmental entities, the ones usually accused of discriminating. It would be in his clients best interest for the fees awarded to prevailing parties to be kept artifically low.

Mr. Purdie states in his affidavit that the normal hourly rate paid by the State of Mississippi and its agencies to private counsel is $90.00. He does not state whether or not that is the rate paid to counsel in the Jackson, Mississippi legal community or outside the Jackson area. He does not state whether or not that rate is contingent upon the years of experience, knowledge, or skill of the attorney involved. Nor does he state whether or not that rate is for complex civil or routine civil cases. In June, 1991, the State Attorney General paid $125.00 per hour to John Price and $100.00 per hour to Barry Zirulnik, both of Thomas Price Alston Jones & Davis. (Ex. 10, p. 161a). That same year the State contracted to pay $100.00 per hour to Bennett Lotterhos & Sulser. (Ex. 11, pp. 163a-164a). In Fiscal Year 1990, the State paid Thomas Price, etc. $493,393.30, $527,066.38 in Fiscal Year 1992, and $933,570.70 in Fiscal Year 1992. (Ex. 7, pp. 127a-130a). The State did pay the attorneys for the law firm of Butler Snow O'Mara Stevens & Cannada maximum of $90.00 per hour for work on one case, **State of Mississippi, ex rel. Mike Moore, State Attorney General, et al. v. Dick Molpus, Secretary of State of the State of Mississippi**, but the State paid six (6) people for working on the case. (Ex. 13, pp. 170a-172a). And, the State did pay attorneys for Dickstein Shapiro & Morin $125.00 per hour for work on **State of Miss. v. United States and Henry Kirksey, et al.**, Civ. Action No. 87-3464 (D.D.C.). (Ex. 15, pp. 179a-193a). These records contradicts Mr. Purdie's affidavit.

In any event, the defendants' affidavits merely state what the State of Mississippi usually pays attorneys on a non-contingent hourly basis. These affidavits do not contradict plaintiffs' market rate evidence for contingency and non-contingency cases. It only shows that a special relationship exists between the State and

some private law firms such that the law firms agree to be paid a reduced rate for representing the State. Such a special relationship does not exists between plaintiffs' counsel and the State. Nor should plaintiffs' counsel be bound to the reduced hourly rate paid to attorneys who enjoy a special relationship with the State. The billing rates that this Court is bound to apply are the "prevailing billing rates", **Blanchard v. Bergeron**, 489 U. S. 87, 94, 109 S. Ct. 939, 103 L. Ed. 2d 67, 76 (1989), and not some "special billing rates" enjoyed by the State.

The defendants, in their Memorandum, argue that plaintiffs billing rate should be reduced by 50% where travel time is involved. Although plaintiffs counsel recognize that this Court has ordered travel time reduction in the past, the Court should now correct those decisions. The Court's travel time reduction in the past was based upon the Court's view of the productivity of the travel time rather than how the market treats travel time. The defendants argue that plaintiffs fee should be reduced when travel time is involved. Yet, these same defendants paid their counsel the normal full hourly rate, as the market dictates, for travel time. For instance, The Standing Joint Committee on Congressional Reapportionment paid Honorable Reuben Anderson, one of its attorneys, the full regular hourly rate for 9.00 hours of travel on October 10, 1991 and for 8.00 hours of travel on October 11, 1991. (Ex. 9, p. 160a). This is the normal billing practice recognized by the State when it hires attorneys. The practice of billing and being paid the full hourly rate for travel time is common place and the norm in the Jackson legal community. This Court is bound to follow that practice. **Hensley v. Eckerhart**, supra.

The defendants argue that plaintiffs' billing records are scanty and lack explanatory detail. This is not true. It has been held that "[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." **Copeland v. Marshall**, 641 F. 2d 880, 891, citing **Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.**, 487 F. 2d 161, 167 (3rd Cir. 1973). What is necessary is

"fairly definite information as to the hours devoted to various general activities, e. g. pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e. g. senior partners, junior partners, associates..." **Copeland v. Marshall**, supra at 891, citing **Lindy Bros. Builders, Inc.**, supra at 167. Plaintiffs' counsels' time records met and exceeded this test for definiteness. Plaintiffs' counsels' billing statements are more detailed than those submitted by Hubbard Saunders, and others, to State agencies for which they are paid. For example, Hubbard Saunders submitted the following excerpts from a bill to Honorable Mike Moore, and the Attorney General paid the bill without question.

Date	Services Rendered	Time
1990		
04/03	Legal research re brief	2.75 hrs.
04/05	Revise and finalize correspondence; legal research re brief	3.00 hrs.
...		
04/18	Legal research on brief, review record, work on brief	4.75 hrs.
04/19	Legal research brief, review record, work on brief	3.90 hrs.
...		
04/25	Review record, work on brief, legal research re brief	6.40 hrs.
04/26	Legal research, review record, work on brief	6.50 hrs.

(Ex. 8, pp. 132a-134a).

Crosthwait Terney Noble & Allain firm's billing

records in the instant case were even more scanty, yet they were paid without question. See Ex. 8, pp. 135a-154a. Yet these billing statements are as detailed as the market requires. See billing statements of Phelps Dunbar, Ex. 9, pp. 155a-160a; Bennett Lotterhos & Sulser, Ex. 11, pp. 163a-166a; Covington & Burling, Ex. 12, pp. 167a-169a; Butler Snow O'Mara Stevens & Cannada, Ex. 13, pp. 170a-172a; Watkins Ludlum & Stennis, Ex. 14, pp. 173a-177a; and Dickstein Shapiro & Morin, Ex. 15, pp. 179a-193a. All of these firm's billing records were scanty when compared to plaintiffs' counsels' billing records. Yet, they were paid by the State without question. These defendants' actions in paying those attorneys should estop them from questioning plaintiffs' billing records practices in the instant case.

5. Defendants, after admitting that plaintiffs achieved exceptional success, now disingeniously argue that plaintiffs are not entitled to an enhancement of the lodestar. Plaintiffs sought a premium hourly rate in this case. They did not seek to enhance the lodestar. Rather plaintiffs sought to enhance the hourly rate for contingency cases above the hourly rate normally paid in non-contingency cases. **City of Burlington v. Dague**, supra, did not preclude the awarding of an enhanced or premium hourly rate. To the contrary, the Supreme Court in **City of Burlington v. Dague**, supra at 4719, expressly stated that "[t]he second factor [in the lodestar model], however, is ordinarily reflected in the lodestar--either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." (emphasis added). If this Court does not grant plaintiffs the premium hourly rate requested, then this Court should certainly award plaintiffs an enhancement above the lodestar for exceptional success. The Supreme Court in **Hensley v. Eckerhart**, supra, 76 L. Ed. 2d at 52, stated that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." The Court went on to state that "indeed in some cases of exceptional success an enhanced award may be justified." (emphasis added). Id.,76 L. Ed. 2d at 52. The

instant case is such a case. Plaintiffs obtained exceptional results in this legislative reapportionment case. They obtained the maximum number of electable black majority districts. This exceptional results is borne out by the recent election results. After the court-ordered legislative primaries, plaintiffs stood a chance of electing 10-11 black Senators where there were 4 before, and 31-32 black legislators where there were 20 before. (See Ex. 5, pp. 103a-110a for number of electable (60% plus black voting age population black majority districts created). This results was exceptional.

6. There should be no downward adjustment of the lodestar. To the contrary, the lodestar should be adjusted upwardly for the exceptional success obtained by plaintiffs. Plaintiffs were completely successful, not just partially successful. Even in **Leroy v. City of Houston**, 831 F. 2d 576, 586 n. 16 (5th Cir. 1987), where the plaintiffs were partially successful, the Court of Appeals only deducted a total of 254 hours from plaintiffs 4,659.95 hours, a reduction of only 5.5%. The defendants' request to reduce the lodestar by 75% is absurd. To the contrary, the lodestar should be adjusted upwardly 100-300%.

7. Plaintiffs' request for reimbursement of litigation expenses is not unreasonable or excessive. Expenses such as travel expenses, meals, lodgings, photocopying, and long distance telephone calls are recoverable. **Blanchard v. Bergeron**, 831 F. 2d 563 (5th Cir. 1987), rev'd on other grounds, 489 U. S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989). Such expenses, as charged by plaintiffs, are reasonable when compared to the expenses charged by attorneys representing the defendants and the State of Mississippi, both in this case and in **Mississippi v. United States and Henry Kirksey, et al**. See Exhibits 8-15, pp. 131a-193a.

8. There is a need for additional discovery in this case. Through additional discovery, plaintiffs could obtain testimony and documents as to the prevailing billing practices in the Jackson legal community, as well as such practices engaged in by private counsel employed by the State of Mississippi and its agencies.

The defendants argue that plaintiffs request discovery concerning a contingency enhancement of the lodestar. That is not what plaintiffs have requested. Plaintiffs merely request the right to proceed with discovery in order to establish what the normal hourly billing rate would be in contingency cases, whether that hourly rate is the same or higher than the billable hourly rate in non-contingency fee cases. If the defendants do not desire discovery on this issue, then they should withdraw their objection to plaintiffs' requested contingency billable hourly rate evidence.

9. An evidentiary hearing on the prevailing market billable rate for complex contingency civil rights cases is required where, as here, the defendants object to plaintiffs' prevailing market rate evidence concerning complex contingency fee civil rights cases. If the defendants do not desire an evidentiary hearing, then they should withdraw their objection to plaintiffs' market rate evidence on this subject. **City of Burlington v. Dague**, supra, does not foreclose plaintiffs' right to a hearing on the subject.

10. Since the defendants agree with plaintiffs that any award of attorney fees should be made directly against the State of Mississippi, no further discussion is required on this subject.

11. The defendants argue that any award of attorneys' fees should direct to whom payment shall be made. Specifically, they claim that payment of any fees awarded to Carroll Rhodes should be directed to be paid to the Internal Revenue Service. The defendants should be directed to pay any fees awarded to plaintiffs' counsel. **Martin v. Mabus**, supra; **Brown v. General Motors Corp., Chevrolet Div.**, 722 F. 2d 1009 (2nd Cir. 1983). Attorney fees may not be paid to the United States. See, generally 42 U. S. C. Section 1988, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."]. Attorney General Mike Moore is directed to pay any levy, not the federal courts. Any award of attorney fees should be made to plaintiffs' counsel, **Martin v. Mabus**, supra, and not to the United States

[I.R.S.]. It is, then, incumbent upon Mr. Moore to follow appropriate federal law with respect to any levy. It is interesting that Mr. Moore tries to hide behind a levy when arguing he needs direction respecting the payment of attorney fees. Yet, he argues that the State, and not the Attorney General, should be directed to pay any fees. And, Mr. Moore argues that neither he nor the State are obligated to pay any fees to plaintiffs. Yet, a levy directs a "person in possession of (or obligated with respect to) property or rights to property subject to levy" to honor the levy. 26 U.S.C. Sec. 6332. If the Attorney General is not in possession of any property belonging to or obligated to pay to plaintiffs' counsel, Carroll Rhodes, any sum, then the levy is not an issue. **Schiff v. Simon Schuster**, 780 F. 2d 210 (2nd Cir. 1985).

12. In support of this Reply and in opposition to the defendants' Response, plaintiffs rely on the authorities cited herein, and respectfully move this Court to relieve them from the requirement of filing a separate memorandum.

13. Plaintiffs specifically request that, in addition to the award of attorney fees and litigation expenses, they be awarded pre-judgment and post-judgment interest on the attorney fees and expenses awarded.

WHEREFORE, plaintiffs respectfully request that this Honorable Court enter an Order granting them the right to conduct discovery and schedule an evidentiary hearing on the prevailing market rate for complex civil contingency and non-contingency cases, and that this Court award them their attorney fees and litigation expenses, together with pre-judgment and post-judgment interest.

And, plaintiffs request that this Court grant them general relief.

Respectfully submitted,
HOLLIS WATKINS, ET AL.,
PLAINTIFFS

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CERTIFICATE OF SERVICE

I, CARROLL RHODES, one of the attorneys for the plaintiffs, hereby certify that I have this day mailed, by the United States Mail, a true and correct copy of the above and foregoing Reply to each of the following:

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Honorable Giles Bryant
Special Assistant Attorney General
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This the 28th day of August, 1992.

/s/Carroll Rhodes
CARROLL RHODES

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HOLLIS WATRINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRAY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, and JOHN QUINCY ADAMS, on behalf of themselves and all others similarly situated

PLAINTIFFS

VS. CIVIL ACTION NUMBER J91-0364 (L)

KIRK FORDICE, GOVERNOR OF THE STATE OF MISSISSIPPI, MIKE MOORE, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, and DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI members of the State Board of Election Commissioners

DEFENDANTS

THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE, TIM FORD, in his official capacity as Speaker of the House of Representatives and OLLIE MOHAMMED, in his official capacity as President Pro Tempore of the Mississippi Senate

DEFENDANT-INTERVENORS

NOTICE OF APPEAL

Plaintiffs, Hollis Watkins, Alice Harden, Aaron Henry, Edward Blackmon, Jr., Samuel McCray, Jacqueline Harper, Ben F. Burkett, Mac Arthur Cotton, and John Quincy Adams, on behalf of themselves and all others similarly situated, pursuant to 28 U.S.C. Sections 1253, 1291, and 2284, Rule 4, Federal Rules of Appellate Procedure, and the Order Constituting Three-Judge

Court entered on July 10, 1991, hereby file their Notice of Appeal and take a simultaneous appeal to the United States Supreme Court and to the United States Court of Appeals for the Fifth Circuit from the Memorandum Opinion and order entered by the Three-Judge District Court on October 29, 1992 denying plaintiffs, as part of the injunctive and equitable relief they requested, the amount of attorney fees and litigation expenses they requested and to which they are entitled.

This the 25th day of November, 1992.

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CERTIFICATE OF SERVICE

I, CARROLL RHODES, one of the attorneys for the plaintiffs hereby certify that I have this day mailed, by the United States Mail, a true and correct copy of the above foregoing Notice of Appeal to the following:

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Attorney General
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Post Office Box 2398
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This the 25th day of November, 1992

/s/Carroll Rhodes
CARROLL RHODES

APPENDIX 5

42 USCS § 1988

§1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USC §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USC §§1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USC §§ 2000d et seq.], the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs (R. S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641; Oct. 21, 1980, P. L. 96-481, Title II, § 205(c), 94 Stat. 2330.)

42 USC § 19731

§19731. Enforcement proceedings

(e) Attorney's fees. In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment [US Constitution, Amendments 14,

15] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Aug. 6, 1965, P. L. 89-110, Title I, §14, 79 Stat. 445; June 22, 1970, P. L. 91-285, § 2, 84 Stat. 314; Aug. 6, 1975, P. L. 94-73, Title II, § 207, Title IV, § 402, 89 Stat. 402, 404.)

(2)

Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

NO. 92-1257

In The Supreme Court of the United States

October Term, 1992

HOLLIS WATKINS, ALICE HARDEN, AARON HENRY, EDWARD BLACKMON, JR., SAMUEL McCRARY, JACQUELINE HARPER, BEN F. BURKETT, MAC ARTHUR COTTON, AND JOHN QUINCY ADAMS

APPELLANTS

VERSUS

KIRK FORDICE, GOVERNOR OF THE STATE OF MISSISSIPPI; MIKE MOORE, ATTORNEY GENERAL STATE OF MISSISSIPPI; DICK MOLPUS, SECRETARY OF STATE OF THE STATE OF MISSISSIPPI; MEMBERS OF THE STATE BOARD OF ELECTION COMMISSIONERS; AND THE STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE; TIM FORD, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE MISSISSIPPI HOUSE OF REPRESENTATIVES; AND WALTER A. GRAHAM, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE MISSISSIPPI SENATE.

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

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41 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction over this appeal under 28 U.S.C. § 1253 from an order of a three-judge district court which ruled solely on an attorneys' fee and cost motion and which does not grant or deny injuncitve relief?

2. Whether this Court lacks jurisdiction over this appeal under 42 U.S.C. § 1973c to review an order of a three-judge district court providing only for attorneys' fees and expenses and which does not terminate the case or grant or deny injunctive relief?

3. Whether an order of a three-judge district court awarding attoneys' fees and expenses but not terminating the case or granting or denying injunctive relief is a matter of such imperative public importance requiring immediate settlement by this Court so as to warrant the granting of certiorari before judgment in the court of appeals under 28 U.S.C. § 1254(1) and Supreme Court Rule 11?

4. Did the Three -judge district court abuse its discretion in ruling on the merits on the Appellants' attorneys' fees motion where pending motions remain in the case, no final judgment, was entered, and where there were imminent special legislative elections yet to be held pursuant to a prior order of that court?

5. Did the district court abuse its discretion in deciding Appellants' attorneys' fees motion without an evidentiary hearing in view of the "wealth of material" before the court?

6. Did the district court abuse its discretion in awarding Appellants $198,688.23 in attorneys' fees and expenses?

7. Whether the district court has denied an award of post-judgment interest under 28 U.S.C. § 1961(a) since a judgment on a separate document has yet to be entered under Fed. R. Civ. P. 54 (a) & 58?

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NO. 92-1257

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HOLLIS WATKINS, ET AL.
Appellants

v.

KIRK FORDICE, GOVERNOR
OF MISSISSIPPI, ET AL.
Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, the Appellees move to dismiss this appeal or, alternatively, to affirm the order of the three-judge district court below. This motion is based on the grounds that (1) this Court lacks jurisdiction; (2) that the case does not warrant this Court treating appellants' jurisdictional statement as a petition for writ of certiorari prior to judgment

in the court of appeals; and (3) the decision of the district court is eminently correct so as to warrant no further review.

STATEMENT OF THE CASE

On October 29, 1992, the United States District Court for the Southern District of Mississippi, sitting as a three-judge court to resolve a challenge to Mississippi's legislative reapportionment based on the 1990 census, entered an attorney's fee order awarding the Appellants $198,688.23 against the State of Mississippi in attorney's fees and costs. This award was made notwithstanding the district court's conclusion that the Appellants obtained no relief from the Court and that the lawsuit had not prompted the Mississippi Legislature to enact reapportionment legislation since such was required by Mississippi law. ***Watkins v. Fordice***, 807 F. Supp. 406, 411 (S.D. Miss. 1992) (three-judge court) (J.S. App. 6a).

This lawsuit was filed on June 28, 1991. Two years prior to the commencement of this action, the Mississippi Legislature initiated its reapportionment activity by postponing the regular August, 1991 primary elections to September and October, 1991. This legislative action was taken in anticipation of legislative and county elections being con-

ducted in the same year as the release of the 1990 census results. A postponement of the regular August primary dates was deemed necessary to enable both the legislature and the counties to redistrict in 1991, obtain federal preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, and to hold elections that year. On June 28, 1989 the Attorney General of the United States precleared under Section 5 the change in the election schedule. MISS. CODE ANN. § 23-15-191 (Revised 1990).

The State of Mississippi received the 1990 decennial census data on January 31, 1991. After a series of public hearings throughout the State of Mississippi, the Mississippi Legislature on April 30, 1991 adopted reapportionment plans for the House and Senate. On May 10, 1991 the United States Attorney General received for review under Section 5 of the Voting Rights Act the 1991 legislative reapportionment plans, and on July 2, 1991 he interposed an objection. *Watkins v. Mabus*, 771 F. Supp. 789, 792 (S.D. Miss. 1991)(three-judge court).

On June 28, 1991, between the date of the submission of the plans to the Attorney General of the United States and

the date of his objection, the Appellants filed this action in the district court challenging Mississippi's then current legislative apportionment (1982 plan), as well as the 1991 plan. Appellants sought injunctive and other relief under Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 & 1973c, and the Fourteenth and Fifteenth Amendments to the United States Constitution. 771 F. Supp. at 791-792.

After a hearing on July 15, 1991, the district court, by order of that date and without opposition from the appellee members of the State Board of Election Commissioners, enjoined the July 19, 1991 legislative qualifying deadline. The district court also requested recommendations for special master or court experts and directed the parties to file their proposed plans on or before July 22, 1991. A hearing was set for July 29, 1991. *Id.* at 793.

A hearing was held between July 29, 1991 and August 1, 1991, after which the court concluded that none of the submitted plans could be used for the 1991 legislative elections. *Id.* at 794-97, 800. The court also found that insufficient time remained to enable it to fashion a plan of its own and, therefore, by order dated August 2, 1991, ordered that in-

terim 1991 legislative elections be held under the 1982 plan. *id.* at 797, 799. Appellants requested the district court to stay the 1991 legislative elections, and this request was denied by order dated August 8, 1991. *Id.* at 791.

On August 9, 1991, Appellants applied to this Court for an injunction and stay pending appeal. Appellants had filed their notice of appeal on August 6, 1991. On August 12, 1991 Appellants filed a supplement to their application for injunction and stay pending appeal. On August 20, 1991, this Court, on the referral of the application by Justice Scalia, denied the application for stay. ***Watkins v. Mabus***, ___ U.S. ___, 112 S. Ct. 17 (1991).

On August 26, 1991, Appellants moved the district court for a preliminary injunction under Section 5 of the Voting Rights Act to enjoin its enforcement of its August 2, 1991 order scheduling the 1991 legislative elections, contending that the order contained new procedures for the elections which had not been precleared under Section 5. On August 30, 1991, the district court denied Appellants' request for a preliminary injunction, concluding that new temporary election procedures for the conduct of the 1991 legislative elections were necessary court ordered changes which did

not reflect policy choices of elected representatives. On September 9, 1991, Appellants filed an amended notice of appeal to this Court. On September 13, 1991, Appellants filed a jurisdictional statement with this Court in ***Watkins v. Mabus***, No. 91-434, and on September 14, 1991 applied to this Court for another injunction and stay pending appeal. On September 16, 1991, Justice Scalia denied Appellants' application for injunction and stay pending appeal.

On October 14, 1991, the appellee members of the State Board of Election Commissioners filed a motion to dismiss or affirm with this Court in ***Watkins v. Mabus***, No. 91-434, and on November 12, 1991, this Court summarily affirmed the orders of the district court, with the exception of vacating the order in part as to election procedures since Appellants' claims were rendered moot by the completion of the September 17, 1991 election. ***Watkins v. Mabus***, ___ U.S. ___, 112 S. Ct. 421 (1991).

The Mississippi Legislature, during the 1992 Regular Session, adopted new plans for the House and Senate (J.R. 1, 202, Mississippi Legislature 1992 Regular Session), incorporating changes in response to the July 2, 1991 objection letter of the Attorney General of the United States. The 1992

reapportionment plans were submitted to the Attorney General of the United States and were precleared by letter dated March 30, 1992, except for three (3) Senate districts. In response to the objection of the Attorney General to the three Senate districts, a new Senate plan was adopted, J.R. 204, which the Attorney General of the United States precleared under Section 5 on May 8, 1992. ***Watkins v. Fordice***, 791 F. Supp. 646, 647 (S.D. Miss. 1992) (three-judge court).

On April 28, 1992, ten (10) days before the final preclearance date, the appellee members of the State Board of Election Commissioners had moved the district court to order immediate and permanent legislative elections for all those districts in Joint Resolutions 1 and 202 that were precleared and to draw temporary districts for Senate Districts 37, 38 and 39, and to order temporary elections in Senate Districts 37, 38 and 39. On that same date the Appellants moved for preliminary and permanent injunctions and for injunctive and declaratory relief setting aside the results and certification of the 1991 election and scheduling legislative elections for late 1992. On May 21, 1992, the district court *sua sponte* entered an opinion and order scheduling special legislative primary elections to be held on

August 4, 1992, with any runoff elections to be held on August 25, 1992. 791 F. Supp. at 649. The court scheduled the general election for November 3, 1992 to coincide with the national presidential and congressional election. *Id.* The district court concluded that the preclearance of both plans (House and Senate) mooted most of the pending motions. *Id.* at 648. The court directed the movants to notify the court as to those motions they desired to be considered and to withdraw the remainder motions. *Id.* at 649. On May 22, 1992, the appellee members of the Mississippi State Board of Election Commissioners promptly withdrew their motion of April 28, 1992 requesting the court to schedule legislative elections, since the court's sua sponte order of May 21, 1991 mooted Appellees' motion (J.S. No. 92-1295 App. 48). Appellants to this date have not complied with the district court's direction, as found by the district court in its order awarding attorney's fees. 807 F. Supp. at 409-10, (J.S. App. 3a).

Appellants moved the three-judge district court to dissolve and to remand the case to the managing district judge for an award of attorney's fees and expenses, after

discovery and an evidentiary hearing on the attorney's fees issues. Appellants requested fees in the amount of $805,659.10 for 2728.8 hours of work claimed by their seven attorneys and reimbursement for expenses claimed in the amount of $61,279.29. Appellants sought a premium hourly rate for the work performed in this case, or alternatively, an enhancement of the lodestar. Appellees filed a joint response opposing the motions. Appellees argued that the three-judge district court should not be dissolved since elections scheduled by the three-judge court were still being conducted and because Appellants had not yet complied with the district court's order concerning identification of motions which were to be considered or which would be withdrawn. Appellees also challenged Appellants' status as prevailing parties in the litigation and challenged the reasonableness of the time, hourly rates and expenses claimed by Appellants. Appellants filed a lengthy reply in support of their motions.

Through its memorandum opinion and order entered on October 29, 1992, 807 F. Supp. at 406, (J.S. App. 2a), the three-judge district court denied Appellants' motion to remand to the managing judge and the requests to engage in discovery and to have an evidentiary hearing on the attor-

ney's fees. The three-judge court awarded Appellants $198,688.23 in attorney's fees and expenses.

Appellants filed a timely notice of appeal on November 25, 1992, simultaneously appealing to this Court, as well as the United States Court of Appeals for the Fifth Circuit. By separate notices filed on November 30 and December 1, 1992, Appellees filed separate simultaneous appeals from the order to both this Court as well as the Fifth Circuit.

ARGUMENT

I. THIS COURT SHOULD DISMISS APPELLANTS' APPEAL

A. Because The Three-Judge District Court's Order Awarding Appellants Attorney's Fees Did Not Include A Grant Or Denial Of Interlocutory Or Permanent Injunctive Relief, This Court Lacks Jurisdiction To Entertain This Appeal Under 28 U.S.C. § 1253.

Appellants claim that this Court has direct appellate jurisdiction under 28 U.S.C. § 1253 to review the order of the three-judge district court providing solely for an award of attorney's fees. 28 U.S.C. § 1253 reads in its entirety as

follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

This statutory provision, on its face, is inapplicable to an order awarding attorney's fees and costs. An award of attorney's fees is not an interlocutory or permanent injunction. As this Court observed in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), an award of attorney's fees is a collateral matter "uniquely separable from the cause of action to be proved at trial." *Id.* at 452.

This Court has previously addressed the issue of whether it has jurisdiction under 28 U.S.C. § 1253 over an independent appeal of an award of attorney's fees. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737 n. 16 (1980), this Court concluded "we would not have appellate jurisdiction under 28 U.S.C. § 1253 to decide the

attorney's fees question had it alone been appealed alone." In that case the Court took jurisdiction under 28 U.S.C. § 1253 since the order appealed from also granted injunctive relief. In finding jurisdiction over the attorney's fees question, the Court relied upon the "whole case" doctrine. *Id.* at 737 n. 16.

The narrowness of this Court's jurisdiction under § 1253 is reflected in the decision of this Court in ***MTM, Inc. v. Baxley***, 420 U.S. 799 (1975), where this Court held:

> [A] direct appeal will lie to this Court under § 1253 from an order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.
>
> *Id.* at 804.

The order appealed from in the instant case involves no grant or denial of injunctive relief and does not rest upon the resolution of the merits of Appellants' constitutional claim presented below.

Dismissal of Appellants' appeal under 28 U.S.C. § 1253 for lack of jurisdiction is consistent with this Court's expressed concern over the need to avoid mandatory jurisdiction over collateral matters such as attorney's fees. In *Heckler v. Edwards*, 465 U.S. 870, 884-85 (1984), this Court examined the scope of appeals under former 28 U.S.C. § 1252 (Repealed 1988)[1], a former basis of mandatory jurisdiction, and there stated:

> A construction of § 1252 that would require us to review collateral issues coming to us as independent matters...would undermine the effectiveness of the direct appeal provision....[T]his Court would be required to give precedence to issues outside the congressional definition of public importance. We could, for example, be obliged to crowd our docket with appeals concerned solely with *attorneys' fees awards* or pendent claims arising under state law.
>
> *Id.* at 884-85 (emphasis added).

In *Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90 (1974), this Court concluded that "only a narrow

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[1] Section 1252 was repealed in 1988. Act of June 27, 1988, 100th Cong., 2d Sess., Pub. L. 100-352, § 1, 102 Stat. 662.

construction [of § 1253] is consonant with the overriding policy historically encouraged by Congress of minimizing the mandatory docket of this Court in the interest of sound judicial administration." *Id.* at 98 (footnote omitted).

In a recent appeal of an attorney's fee award by a three-judge district court in a state legislative reapportionment case, this Court in *Clinton v. Jeffers*, ___ U.S. ___, 112 S. Ct. 1462 (1992), summarily vacated the judgment and remanded the case to the district court with instructions to enter a fresh judgment to enable an appeal to the United States Court of Appeals for the Eighth Circuit. The appellants in *Clinton*, unlike the Appellants in the instant case, had not taken a protective appeal to the Court of Appeals.

Here the order appealed from provided only for attorney's fees. The Appellants have filed an appeal to the Fifth Circuit (J.S. App. 69a-70a). Accordingly, this Court should dismiss Appellants' appeal under 28 U.S.C. § 1253 for lack of jurisdiction.

B. 42 U.S.C. § 1973c Does Not Provide An Independent Jurisdictional Basis For Direct Appellate Review Of Orders Providing Only For Attorney's Fees.

As an alternate independent basis of jurisdiction, Appellants claim that this Court has direct appellate jurisdiction over the attorney's fees award pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, which provides in pertinent part:

> Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of Section 2284 of Title 28, and any appeals shall lie to the Supreme Court.

In *NAACP v. New York*, 413 U.S. 345 (1973), this Court held that a direct appeal would lie to the Supreme Court from an order denying intervention in a suit under § 4(a) of the Voting Rights Act of 1965, where the district court's order terminated the case by granting the State of New York's motion for summary judgment. The Court concluded that the words "any appeal" in § 4(a), which language is also found in § 5 of the Act, "could be said to include review

of any meaningful determination made in the progress of the § 4 lawsuit." *Id.* at 343-344. The Court determined that the broad meaning of "any appeal" was consistent with the congressional desire to remove as quickly as possible voting restraints on account of race or color. *Id.* at 354.

However, in ***Mississippi v. Smith***, 461 U.S. 912 (1983), this Court summarily dismissed for lack of jurisdiction an appeal based on § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. In that case the State of Mississippi sought a direct appeal to this Court under § 5 from a decision of a District of Columbia three-judge district court denying the State of Mississippi's motion for partial summary judgment and motion in limine in a §5 preclearance action. ***Mississippi v. Smith***, 541 F. Supp. 1329 (D.D.C 1982).

In the instant case the attorney's fees order cannot properly be characterized as a meaningful determination made in the progress of the § 5 lawsuit. The three-judge district court had been convened under 28 U.S.C. § 2284(a)

to consider appellants' claims challenging the constitutionality of the apportionment of the Mississippi Legislature. Appellants also invoked the three-judge district court's jurisdiction under § 5 of the Voting Rights Act t enjoin the enforcement of the 1991 legislative reapportionment resolutions, since such resolutions had not been precleared under § 5. In this context the district court held as follows:

> As the parties recognize, *the 1991 plan is not in issue*; because it has not been precleared, it has no effect. 42 U.S.C. § 1973c. This was, among other things, recognized by the resolutions adopting the 1991 plan. Miss. J.R. No. 4 at p. 27 (1991) and Miss. J.R. No. 202 at p. 19 (1991).

771 F. Supp. 789 at 798 (emphasis added).

The State of Mississippi made no attempt to enforce the unprecleared resolutions, which on their face did not take effect until they were precleared. Therefore, the district court had no occasion to exercise its § 5 jurisdiction. A three-judge district court under § 5 of the Voting Rights Act of 1965 has very limited jurisdiction when sitting as a § 5 "coverage"

court. It can only decide whether a change with respect to voting is subject to § 5 and, if so, whether that change has been precleared and, if not, what is the appropriate remedy. *City of Lockhart v. United States*, 460 U.S. 125, 134-135 (1983). When the three-judge district court made its determination of the attorney's fees issue, it was clearly exercising its jurisdiction retained under 28 U.S.C. § 2284(a), and it was not functioning as a § 5 "coverage" court under 42 U.S.C. § 1973c. Accordingly, 42 U.S.C. § 1973c cannot serve as a basis of Appellants' appeal from the order of the three-judge district court providing only for an award of attorney's fees. Therefore, this Court should dismiss Appellants' appeal under 42 U.S.C. § 1973c for lack of jurisdiction.

C. Appellants' Alternate Request That This Court Treat Their Jurisdictional Statement As A Petition For Writ Of Certiorari, Prior To Judgment In The Court Of Appeals, Fails To Comply With Rule 11 Of This Court.

Appellants request that this Court treat their Jurisdictional Statement as a petition for writ of certiorari, prior to

judgment in the court of appeals, if this Court should conclude that it lacks jurisdiction of their appeal. Appellants' Jurisdictional Statement fails to comply with Rule 11 of the Rules of this Court and should not be treated as a petition for writ of certiorari before judgment in the court of appeals. Rule 11 of the Rules of this Court provides as follows:

> A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such *imperative public importance* as to justify deviation from normal appellate practice and to require immediate settlement in this Court. 28 U.S.C. § 2101(e).

SUP. CT. R. 11 (emphasis added).

Appellants' jurisdictional statement makes no attempt to demonstrate that the requested review of the attorney's fees order "is of such *imperative public importance* as to justify deviation from normal appellate practice and to require immediate settlement in this Court." SUP. CT. R. 11 (empahsis added). The obvious reason for Appellants' failure to comply with Rule 11 is that no such showing could con-

ceivably be made in connection with a requested review of an order providing only for attorney's fees.

This Court's power to grant certiorari prior to judgment under 28 U.S.C. § 2101(e) is sparingly used and is essentially exercised "because the issues presented are of great significance and demand prompt resolution..." ***Dames & Moore v. Regan***, 453 U.S. 654, 668 (1981). In ***U.S. v. Nixon***, 418 U.S. 683 (1974), this Court granted certiorari prior to judgment of the United States Court of Appeals for the District of Columbia Circuit to consider President Richard M. Nixon's claims of absolute executive privilege in response to a subpoena seeking production of presidential tapes. Review was granted under 28 U.S.C. § 2101(e) "because of the public importance of the issues presented and the need for their prompt resolution." *Id.* at 686-687. *See also* ***Wilson v. Girard***, 354 U.S. 524 (1957) (a case involving the delivery of a United States soldier to Japanese authorities for criminal trial); ***U.S. v. United Mine Workers***, 330 U.S. 258 (1947) (a case

involving a nationwide coal strike where the mines were in government possession under a seizure order); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (a case involving the validity of the Bituminous Coal Conservation Act of 1935).

The instant case simply does not warrant a dramatic departure from normal appellate practice.

Moreover, Appellants noticed their appeal from the order awarding attorney's fees while other motions were still pending and without any final judgment being entered in the district court. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), this Court, quoting *Catlin v. United States*, 324 U.S. 229 (1945), held a decision is final when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." The attorney's fees order is not an executable final judgment. Accordingly, since this Court's jurisdiction under 28 U.S.C. § 2101(e) is derivative of the court of appeals' jurisdiction under 28 U.S.C. § 1291, this Court also lacks jurisdiction under 28 U.S.C. § 2101(e) since

no final judgment was entered in the district court.

For all of the above reasons, the Court should dismiss Appellants' appeal or alternate petition for writ of certiorari prior to judgment in the court of appeals for lack of jurisdiction. Also, certiorari under 28 U.S.C. § 2101(e) should be denied for failure to comply with SUP. CT. R. 11.

II. IN THE ALTERNATIVE, THIS COURT SHOULD SUMMARILY AFFIRM THE DISTRICT COURT'S ORDER.

In the event that the Court determines that it has jurisdiction over this appeal, then the Appellees respectfully submit, in the alternative and without waiving their contention that this Court should reverse the district court's order on the grounds asserted in their separate pending Jurisdictional Statement in ***Fordice v. Watkins***, No. 92-1295, that the questions presented by Appellants are not substantial. Accordingly, this Court should summarily affirm the district court's Memorandum Opinion and Order on Appellants' appeal.

A. The Three-Judge District Court Properly Ruled On The Merits of Appellants' Attorneys' Fees Motion Because Pending Motions Remained In The Case, No Final Judgment Was Entered, And The Court Enjoyed Discretion To Entertain Such A Motion.

It is axiomatic that if there is a claim in a case that must be heard by a three-judge court, the three-judge court has the power to decide other claims in the case that standing alone would require only a single judge. *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 504, n. 5 (1972); 17 *Wright, Miller & Cooper*, Fed. Prac. & Proc., Jur. 2d § 4235, at 624 (1988). The three-judge district court below followed that axiom by addressing the merits of Appellants' attorneys' fees motion and refusing to dissolve itself. 807 F. Supp. at 410 (J.S. App. 4a).

The district court's refusal to dissolve itself was not an abuse of discretion, given the fact that there remained other motions pending before the district court, the district court had not entered a final judgment in the case, and indeed there

were impending legislative elections ordered by the district court which were to occur on November 2, 1992. All these reasons counselled in favor of the three-judge court remaining convened. Therefore, this issue is plainly insubstantial and does not merit plenary consideration by this Court.

B. The District Court Did Not Abuse Its Discretion In Deciding Appellants' Attorneys' Fees Motion Based On The "Wealth of Material" Before It Without An Evidentiary Hearing.

This Court has repeatedly noted that an attorneys' fees request should not result in second major litigation. *E.g.*, *City of Burlington v. Dague*, ___ U.S. ___, 112 S.Ct. 2638, 2643 (1992); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The district court explicitly noted this point. 807 F. Supp. at 415 (J.S. App. 14a). Appellants' contention here that they were entitled to an evidentiary hearing before the district court, if sustained by this Court, would produce just such a result.

As the district court noted, the parties provided it with a "wealth of material." 807 F. Supp. at 415 (J.S. App. 14a).

These materials included the affidavits of several attorneys, the results of a 1989 membership survey of the Mississippi Bar, and several bills of private counsel employed by state agencies in this and other litigation.

This Court's decision in *Blum v. Stenson*, 465 U.S. 886, 892-93 (1984), does not compel an evidentiary hearing on the facts of this case. In *Blum*, this Court held that the petitioner there had failed to submit any evidence challenging the accuracy and reasonableness of the hours charged by the respondents and therefore had "waived its right to an evidentiary hearing in the District Court. *See City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 472-473 (CA2 1974) (where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award)." 465 U.S. at 892-93 n.5. This passage does not, as Appellants erroneously argue, establish a requirement of an evidentiary hearing on every contested attorneys' fees motion.

The district court here (composed as it is of 3 judges who were experienced trial lawyers) carefully reviewed the parties' extensive evidentiary materials and memoranda and assessed the fee which in its good judgment was reasonable in the circumstances of the case. *See* ***Blanchard v. Bergeron***, 489 U.S. 87, 96 (1989).

The district court did not abuse its discretion in failing to grant an evidentiary hearing, and this point does not merit plenary review by this Court.

C. The District Court's Award Of Attorneys' Fees Was Not Unreasonably Low.

Appellants complain that the amount awarded by the district court was unreasonably low because the district court failed to consider properly the results obtained and because it awarded lower hourly rates than those sought by Appellants. J.S. 9-11. This complaint is not substantial and certainly does not warrant plenary review by this Court. *See* ***Farrar v. Hobby***, ___ U.S. ___, 113 S. Ct. 566, 580 (1992).

(White, Blackmun, Stevens & Souter, JJ., concurring in part and dissenting in part) ("Estimating what specific amount would be reasonable in this particular situation is not a matter of general importance on which our guidance is needed.").

The district court explicitly considered and rejected an enhancement for the Appellants' claimed exceptional level of success. The district court stated in pertinent part:

> Plaintiffs suggest that another basis for awarding an enhanced fee is the exceptional level of success they attained. The court cannot conclude that such an enhancement would be appropriate in this case. While the court is persuaded that plaintiffs' efforts contributed to the legislature's redistricting plans for the State, and attained their goal of establishing the maximum number of majority black districts, the court attributes plaintiffs' success to the time expended toward achieving their goal, and has accounted for their success in the computation of hours for which they will receive compensation.

807 F. Supp. at 417 (J.S. App. 18a). The court went on to note that the plaintiffs' level of success in the district court was

quite low. *Id.* at n.22. Thus, the district court's rejection of an exceptional success enhancement was consistent with this Court's teaching that "[b]ecause acknowledgement of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." ***Blum v. Stenson***, 465 U.S. at 886 (footnote omitted).

The hourly rates awarded by the district court ($110 for Messrs. Rhodes and Walker and $95 for appellants' five other counsel, 807 F. Supp. at 415 (J.S. App. 15a)) were clearly within the range of rates before the district court ($70-200, 807 F. Supp. at 415-16 (J.S. App. at 14a-16a)), and do not demonstrate a failure by the district court to consider the results of this litigation. Thus, this issue is not substantial.

D. Because No Judgment Has Been Entered, The District Court Has Not Yet Denied An Award Of Postjudgment Interest.

The federal statute dealing with interest states in pertinent part:

> Interest shall be allowed on any money *judgment* in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the *judgment*, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of *judgment*. . . .

28 U.S.C. § 1961(a). This Court has held that postjudgment interest properly runs from the date of the entry of judgment. ***Kaiser Aluminum & Chemical Corp. v. Bonjorno***, 494 U.S. 827, 835 (1990).

Here, the district court entered a memorandum opinion and order on attorneys' fees and costs which does not mention interest. However, the district court did not enter a judgment, as defined by Fed. R. Civ. P. 54(a), on a separate document as required by Fed. R. Civ. P. 58. Therefore, entry of judgment, the event which would trigger the running of postjudgment interest under 28 U.S.C. § 1961(a), has not yet occurred, and the district court has not yet denied interest.

Accordingly, Appellants' complaint about interest not having been awarded is premature and does not merit plenary review by this Court.

CONCLUSION

For these reasons the appeal should be dismissed for lack of jurisdiction; alternatively certiorari should be denied; alternatively this Court should summarily affirm the order of the United States District Court for the Southern District of Mississippi.

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Jackson, Mississippi
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